Parliament and the Church of England
The Making of Ecclesiastical Law

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ABSTRACT

This thesis examines one of the pillars of the constitutional link between Church and State. It focuses on the unique process by which Church legislations (Measures) are drafted by a legislative body of the Church (the General Synod) and presented to Parliament for approval. The thesis looks at the role played by Parliament and examines how well it performs this role. The responsibility for scrutinising Measures lies with a joint committee of both houses, the Ecclesiastical Committee. This Committee cannot amend a Measure and can only declare it expedient and present it before the House for approval or reject it. An analysis of this legislative process is missing in the current literature. This thesis aims to fill this gap and provide a study supported by case studies of this important legislative process.

The first part of this thesis analyses this process in detail together with the role of the Ecclesiastical Committee. The case studies illustrate how parliamentary scrutiny of ecclesiastical measures has become more interventionist than the restrictive framework set up by the 1919 Enabling Act. The **Appointment of Bishops Measure 1984** was passed by a deeply-divided Ecclesiastical Committee. Once the Measure reached the House of Commons, members of the Committee who had opposed it, presented their views before the House. The Measure was rejected by the Commons. The **Clergy Ordination Measure 1989** faced a difficult passage through the Committee, as members were unhappy about the changed voting system used by the General Synod to pass this Measure. The **Priests (Ordination of Women) Measure 1993** saw the Church having to concede to demands to include opponents to this Measure in the joint consultation process. The final case study is the **Churchwardens Measure 2001,** which was rejected twice by the Ecclesiastical Committee. Eventually the Measure was passed after the Church accepted all its recommendations.

The third section with Comment and Analysis on the research addresses the wider context of Church-state relations today and the pressures and challenges upon the future of establishment and, with it, the place of Parliament in the making of ecclesiastical law. The greater scrutiny of ecclesiastical legislation has arguably ensured that the Church of England has been more open to broader opinions in society. On the other hand, the way in which the legislative procedure works has also sometimes enabled narrow interests in Parliament and in the Church to set the agenda or to block change. Although reform in the immediate future is unlikely, the link between Parliament and the Synod has been the object of criticism in some political and religious quarters (particularly from those who support disestablishment). At some point administrative changes to ecclesiastical law-making is likely. The thesis concludes that given the important role played by Parliament in legislating for the Church, misguided or badly structured reforms can have serious consequences for the established Church and the Monarchy to which it is so closely linked.

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I dedicate this thesis to my two boys, Ariz and Fariz.

CONTENTS

PART I - ESTABLISHMENT

CHAPTER 1. INTRODUCTION

1.1 The aim of the Thesis

The exceptional relationship between Church and State in England has many dimensions, social, cultural, historical and economic. This aim of this thesis is to focus on the legal framework linking Church and State, by examining the processes through which Parliament and in specific, the Ecclesiastical Committee makes laws for the Church of England. The thesis suggests that the relationship of the Church with Parliament (in effect the Ecclesiastical Committee) forms the core of establishment. To borrow Bagehot's terminology, this is the "efficient" part of the State-Church relationship. The relationship of the Church with the Monarchy is the "dignified" part of this relationship. This thesis is an analysis of the working relationship between Parliament and the Church of England, the process by which a Measure (a Legislative Bill drafted by the General Synod) is examined by Parliament is important. The assertion is that the legislative link between the Church and the State is a critical pillar which is keeping the edifice of establishment upright.

To understand the background to the State Church relationship, historical legacy of establishment is explained in the first section. The second section and in specific, the case study chapter provides evidence of how the Ecclesiastical Committee works. The third section of this thesis looks at the wider context of Church-State relations today and

the pressures and challenges upon the future of establishment and, with it, the place of Parliament in the making of ecclesiastical law which may be threatened if State-Church relations undergo changes or constitutional reform.

In his book Liberty in the Modern State, Harold Laski wrote "there is no liberty if a dominant group can control the social habits of the rest without persuading the latter that there are reasonable grounds for the control". He went on to say that people who are imprisoned by dogmas and stereotype from childhood "may well have been so taught that they either, after effort, succumb, or do not even know that it is necessary to struggle at all"[1]. Even if Establishment has served Britain well (and as I have suggested, there is evidence that it may well have), we still need to enquire exactly what Establishment is, why it may have worked in the past, and whether it is likely to do so in the future and the role of Parliament in sustaining this special relationship.

There is no ongoing dialogue between the leaders of the Church and the State on Establishment. Often the debate is ignited by a single event as we will see later in the thesis[2] and ceases once the crisis or event has passed. A recent book by Michael Turnbull and Donald McFadyen on *The state of the Church and the Church of the state: re-imagining the Church of England for our world today*[3] acknowledges the failure of the Church of England to present itself as distinctive and vital to the well-being of the nation and presenting to the outside world the positive contributions made by the Church in political, cultural and economic spheres.

[1] Laski, H. (1930), P 183.

[2] The re-marriage of Prince Charles is a good example.

[3] Turnbull and McFadyen (2012).

We live in times of change as pointed out by Vernon Bogdanor who wrote in his book *The New British Constitution* that one of the central themes of the second half of the 20th century in this country has been "a striking loss of national self-confidence" and this has reflected in a loss "of confidence in our institutions and in our constitutional arrangements"[4]. Turnbull and McFadyen suggest that change in the nature of the State has led "to a confusion of what England is and, by implication, a drain on the confidence of the Church of England to know what its role is[5]".

There does not seem to be a coherent strategy from the Church of England in the present time to defend its position as the flag bearer of faith in this country. The next section will look at the role of religion in society.

1.2 Why is the relationship of State and Church in England relevant for this century?

The constitutional link of Church and State in England may come across as something of an oddity to some. A historical legacy which may not have any significance in today's modern secular age. Very much like the role of religion in today's society which is no longer seen as relevant by some people in England. In a survey in *The Times*[6]newspaper in 2005, only one in twenty in the age group 18-24 could name Dr.

[4] Bogdanor (2009), p 4. The changes brought about by Devolution, the incorporation of the ECHR and even the demographic changes to this country from immigration.

[5] Turnbull and McFadyen (2012), p 85.

[6] C of E failing to get its message to the C of Es. April 21, 2005.

Rowan Williams as the Archbishop of England. A slightly smaller percentage than that named Pope John Paul II as the Archbishop of the Church of England. The article suggested that their survey seemed to indicate that the Church was no longer being able to engage with the young. In the survey, only a quarter of the top social classes, A and B, recognised Dr. William's name, compared with one in ten of those classified as C to E. The majority of those surveyed felt that Roman Catholics in Britain were "more sure of their faith" than Anglicans. Most felt that Britain was no longer a religious country[7].

Kathleen Jones book *Challenging Richard Dawkins*[8] warns against falling into the trap of imagining a time in England when the Church of England was widely respected and everyone followed the Ten Commandments. She describes this "golden-age theory[9]" as a "fictional myth"[10]. She goes on to suggest that today's

> "…society as a whole has become more Christian, not less. The parable of the Good Samaritan still exerts a powerful influence; and the principle of working for the common good also applies to animal welfare, conservation, environmental care…[11]".

According to Jones, the role that Churches played in the past in providing social welfare is now being provided by the central Government or Local Authority. This is not due to any anti-religious sentiments but rather as the State has the technical skills and

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[7] A finding disputed by Steve Jenkins, head of the Church's media relations in the article, who pointed out that 76.8 per cent of the population, stated their religion in the 2001 census.

[8] Jones (2007).

[9] She describes this theory as "sentimental harking back to a time…when life was much simpler and values clearer…". *Ibid*., p 145.

[10] *Ibid*,.p 145.

[11] Jones (2007), p 147.

resources to deal with social welfare matters which were now "too big" for an institution like the Church of England to address on its own[12].

This pragmatic view of the role of the Church and religion in English society is also reflected by the retired Bishop of Oxford, Lord Harries in his book on faith in politics where he suggests that

> "…whether we like it or not, in a democratic society we are bound to have a crowded market-place in which religious voices, among others, will be seeking to be heard, and trying to persuade others that certain political policies are better than others…[13]".

Among these "religious voices", the voice of other Christian denominations like those of the Roman Catholics has gained influence in recent times. Writers such as Theo Hobson seem to suggest this increase in influence is to the detriment of the voice of the Church of England. In a 2005 article in *The Times*[14], he writes that if a Martian were to read the press in this country, he would think that Britain "was split between Roman Catholicism and atheism". He gives the example of Adrian Hilton, the Tory candidate for Slough, who was sacked by the party after The Catholic Herald pointed out that Hilton had written an article defending the Act of Settlement 1701 as evidence of the

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[12] *Ibid*., p 146.

[13] Harries (2010), p 15.

[14] The Church that lost its spirit. May 7, 2005.

"de-Protestantisation" of the country. According to Hobson, the main reason for the disregard of the Church of England in the media and society as a whole is the "Catholicisation of the Church of England" and he blames the prevailing secularism in this country as being "a Protestant invention".

Theo Hobson's assertion that the growing confidence of Catholic presence in this country is undermining the Church of England is a controversial position and difficult to accurately access. The recent reform of what was seen by many as an "anti-Catholic" law, The Act of Settlement and the reforms to the blasphemy legislation does indicate that the Government is committed to make all religious denominations equal and remove discrimination under the law. However, the Church of England remains "first among equals" because of the historical established link between Church and State.

As far back as January 2005, Lord Dubs tried to introduce changes to this Act. He had described this as a "sensible and long overdue" Bill, which aimed to tackle the issues of discrimination based on gender and discrimination against Catholics. Ann Taylor, who adopted the bill as a private members' bill in the House of Commons, supported him in this endeavour. The reasons Lord Dubs gave for trying to change this Act was that the "monarchy should symbolise the values of this country…we don't want is a situation where the values of the country have moved on and the monarchy is centuries behind". The Lord Chancellor, Lord Falconer felt it was "too complex an undertaking" which needed proper consultation.

One complexity in changing the Act of Settlement was the need to get of the approval of Commonwealth realm nations to any changes (those countries where the Queen is recognised as the constitutional Head of State). In the middle of 2011 the Prime

Minister wrote to all the head of the Commonwealth realm informing them of the proposed changes which were subsequently discussed in the Perth CHOGM in October 2011. On the 4th of December 2012, Nick Clegg made the announcement that the Government had got the approval from all the Commonwealth realm nations and would subsequently be introducing a Bill in Parliament to end the principle of male primogeniture and the law would also change with regard to the ban of anyone in the line of succession marrying a Roman catholic. The requirement that the monarch has to be in communion with the Church of England remains[15].

It is debateable on how well the Church has presented its arguments in times of controversies. One example of this was the uncertainty surrounding the marriage of Prince Charles and Camilla Parker Bowles, the death of Pope John II and the response to his death in Britain (the unprecedented decision for the Prime Minister and Archbishop to attend the funeral of the Pontiff)[16] and the delay by a day of the marriage ceremony of the future heir to the Supreme Governorship of the Church in deference to the funeral of Pope John II. In an article by *The Independent*, published the day after the funeral of the Pontiff, the writer suggested that "in becoming more Continental" this country was also becoming "more Catholic[17]". The Church of England did not take a lead voice at this time and seemed to be swept along with events as they unfolded.

[15] http://www.bbc.co.uk/news/uk-20600543

[16] According to The Guardian, April 5, 2005, even before the formal announcement was made by Clarence House, (that the wedding was being postponed by a day). Diplomatic sources had made it very clear that the Prime Minister would be attending the funeral and not the wedding on Friday.

The other issue for the Church of England is that the success or failure of its contribution to society and the State is difficult to access. One of the attempts by the Church of England to address this lack of information has been criticised in a recent book on the Church of England. The move by the Church has to adopt business practices to try and make the church quantifiable "efficiency" and "efficiency" has been questioned. The authors question how asking "whether the church is effective is a bit like asking if a marriage is "effective"- it's an inappropriate question to ask of a covenant relationship that runs on self-giving[18]".

A similar problem is encountered when trying to access how religious or secular a nation. There is no quantifiable data available. This is not an exact science. There are some pointers such as the laws of abortion in a country which can be used as an indicator as it would indicate the influence of religious leaders in such matters. Historically the Church has been pro-life (especially the Catholic Church). However such laws do not necessarily reflect the attitude of its citizens or indicate if they are religious. The only quantifiable way to access the importance of religion and adherence of faith in a State is looking at Church attendance numbers. This comes with its own difficulties as attending Church on Sundays is not mandatory for a person professing to be a Christian[19]. There can be no clear evidence that can prove that religion is still important in England today. My view is that The Church of England reflects the Judeo-

[17] "Time to put church and state asunder". April 9, 2005.

[18] Turnbull and McFadyen (2012), p 71.

[19] In Islam, Friday or "Jumma" prayers is something which is very strongly advocated in the Quran and in most Islamic States, the prayers are seen as "mandatory" by many of its citizens. This "compulsion", be it social or State encouraged to attend Sunday prayers does not exist in Western societies.

Christian which is similar to the belief of many of the citizens of this country (even the recent predominantly Muslim immigrants from Pakistan and Bangladesh). This forms the common thread which unites people of different religious denominations. Religion does have a role to play in this country. It just is hard to prove that hypothesis.

1.3 Comparative Perspective

As a British citizen of Indian origin, many of the features of the English Constitution that appear to be unexceptional to people who have been born and brought up in this country appear to an outsider to be curious and exceptionally interesting. The Established Church is one such curiosity, particularly when one sees it in the context of a largely secular society and in comparison to the fraught relationship between state and religion in many other countries.

Before settling in Britain, I spent the first 22 years of my life in India where religion has played a much more conspicuous role in contemporary politics. On achieving independence from Britain in 1947, India was partitioned according to religion into two separate nations. India was established as a secular nation with a parliament based on the Westminster Model and a written constitution with Fundamental Rights modelled on the Bill of Rights in the United States. Around a third of the Muslims of the Indian subcontinent remained in India after partition, including my family. Pakistan, in contrast, was established as a country for the Muslims of India and over time (though, interestingly, not initially) it attempted to construct its state on "Islamic" principles.

While different from each other and from Britain, the constitutional relationship between religion and the state in both India and Pakistan proved to be deeply problematic, and remains so to this day. The very different constitutional approaches to religion in India and Pakistan nevertheless faced quite similar problems in the end. This background provided some of the big questions, which motivated my research. The relationship between church and state, in Europe during the Reformation, evolved in the context of gradual social and economic developments in contemporary Europe20. In contrast, developing countries like India and Pakistan had not developed much under colonial rule and wanted to catch up rapidly. This created a very different background in which new relationships between religion and politics had to be forged.

In India, despite the constitutional commitment to secularism, the experience of minorities has not always been a happy one. The separation of state and religion envisaged by the Constituent Assembly, which drafted the Indian Constitution is referred to in the Preamble to the Indian Constitution and in the statement of Fundamental Rights but was never truly enforced by successive governments. Competing parties including the "secular" parties politically promoted religious, linguistic and caste-based interests. The political will to adhere to the secular principles of the Constitution was absent and perhaps the level of social and economic development of the country did not allow it. The recent upsurge in Hindu fundamentalism in India is a testimony to this failure. The bloodshed in the Indian State of Gujarat between sections of the majority Hindu population and the minority Muslim

[20]Tawney (1938) provides a fascinating account of the social background to the Reformation in England.

population in February and May 2002 and the continued attacks on Christian missionaries in the eastern State of Orissa and in Karnataka in the south of India exemplify the continued difficulties faced by minority religious groups today.

In Pakistan problems arose in different ways but the effects were quite similar. From its inception Islam had been determined to prevent the formation of a formal "church" hierarchy, which could be a third force in society apart from citizens and the state. Paradoxically, this eventually made the accommodation of religious sentiments by modernizing Muslim states much more difficult. Post-colonial Muslim countries inherited the ideal of the early Islamic state where the legitimacy of the ruler was based on his adherence to the precepts of religion. These precepts had been sufficient in the early years of Islam for guaranteeing justice and equal development for the Umma (the community of believers). Nevertheless, the idea that the legitimacy of the state depended on its satisfaction of the religious values of its citizens has resulted in tensions and has allowed groups (in the past) such as the Taliban in Afghanistan to take over the State apparatus.

The ideological inheritance of post-colonial Islamic countries clearly very often made them relatively unstable. While all developing countries faced social dislocations, in Islamic countries, discontent was much more easily mobilized to challenge the legitimacy of the state when post-colonial regimes were neither adhering to Islamic values nor achieving social justice. The revolution in Iran in 1979, which saw the Shah being deposed by Ayatollah Khomeini, is one such example. Two more contemporary

examples are Algeria and Egypt (before the recent changes with the fall of Mubarak), where religion became a powerful symbol for organizing "opposition" to the State. Given Islam's claim to judge both the state and the outcomes of its governance, it is not surprising that Islamic countries have faced and continue to face serious problems in establishing stable democracies particularly when they also attempted to move towards secularism. Internal conflicts in Pakistan led to the creation of Bangladesh in 1971 and contemporary Pakistan and Bangladesh remain politically volatile. In both countries, religion remains a powerful rallying point for the disaffected.

It was against this background that I began to investigate the special relationship between church and state in Britain. On the one hand, the political implications of this relationship in Britain have been quite different compared to Islamic countries. As in the latter, religion and politics were difficult to separate in Britain. But paradoxically, an institutionalized relationship between the two allowed a gradual secularization of British society after the Reformation. The answer to this puzzle seems to lie both in uninterrupted economic development but also in the political settlement underpinning the Reformation which gave the Church of England a privileged position while in fact subordinating it to a state which was not interested in purely religious issues. The interesting implications of the British experience for contemporary developing countries are unfortunately beyond the remit of this dissertation. It is something I hope to do in future research.

My experience as an Indian Muslim with British citizenship also made me concerned about the implications of Establishment for minority faiths or those of no faith in today's multicultural Britain. Here too, the comparisons were paradoxical. It intrigued me that minority rights appeared to be better protected in Britain with its established Church than in secular India with its Fundamental Rights, which ostensibly protected minorities. This is the case despite the hastily drawn up anti-terrorism legislation which came into effect in this country following the September the 11th attack on the United States and which was perceived by some Islamic groups as targeting members of their community. There has not been a dramatic shift in the way minority religions are protected in this country under the law, despite the increased suspicion of the activities of certain radical Islamic groups in this country following the attack on the World Trade Centre and the Pentagon in the United States and the July 7th 2005 bombings in London.

The experience of the United States too suggests that the constitutional separation of church and state may not be sufficient for ensuring that religion stays out of politics or that the interests of minority religions are protected. Edward Said had pointed out that "religion in the United States plays a much greater role than most foreigners are aware of...at least 200 million Americans are affiliated to one or other religious sect, the most numerous being ultra-conservative, anti-foreign, anti-abortion, anti-women, anti-labour, anti-welfare and anti-tax in their vague general beliefs"[21]. The schism in the United States between a society with deeply-held religious beliefs and a resolutely secular federal government has resulted in issues such as abortion and stem cell research

[21] The Observer, 8th February 1998.

becoming a battleground for polarised opinions[22]. Nevertheless, despite the apparent moderation in religious politics in Britain which is very probably associated with the historical legacy of Establishment, one has to be uneasy about and examine carefully the future constitutional significance of having a Church which is "by law established" and the special privileges and opportunities which it continues to enjoy as a consequence of it.

While the questions that motivated my research were and remain big questions, a detailed examination of their political implications is once again beyond the remit of this dissertation. The bulk of the dissertation examines the constitutional detail, which defines the nature of Establishment in England, by examining the way in which Parliament makes laws for the Church of England. A careful examination of these questions does of course have implications for the bigger questions I started with but which I can only hope to more fully address in the future.

1.4 Methodology and Structure

An examination of State Church relations has to be a multi-disciplinary one. To make sense of Establishment today, one has to read and understand the History of this relationship which evolved over centuries. The first section of this thesis is a brief overview of this history. Relevant aspects of the Reformation Settlement are critically reviewed in this section using material from the humanities, theology and the history of

[22] Clark (1994), p 95.

constitutional law, . This is followed by a review of how the role of Parliament changed and strengthened after the break with Rome.

A similar interdisciplinary methodology was used to look at the background to the first major constitutional change in this relationship leading to the adoption of the Enabling Act in 1919. In addition to a literature review, the debate in Parliament in both Houses of Parliament is looked at in detail during the passage of this bill through Westminster.

An explanation of how the Ecclesiastical Committtee worked is then illustrated using four Measures as case studies. The study begins with the draft Measures that were presented to the Ecclesiastical Committee and the Report presented to the Committee by the Legislative Committee of the General Synod. The progress of the Measures are analysed by following the debate in the Ecclesiastical Committee which are covered in the Report. The Parliamentary debate is followed by scrutinizing the Hansard transcripts and looking at comments in newspapers, books and articles on that particular Measure. The case studies selected were from the mid 1980s to the early 2000s.

The final section discusses contemporary Church-State conflicts and looks at challenges ahead for the continuation of this Established relationship. The materials used for this study, apart from academic material from different disciplinary backgrounds, include radio interviews, newspaper articles, and Hansard.

This is a very broad subject despite the focus on the role of Parliament. Hansard has been a significant and important source of primary material for this analysis. It would have been desirable to look at the subjective interpretations of these debates by the direct participants. But despite a number of attempts to interview different Members of the Ecclesiastical Committee, I was unable to get interviews, partly because these senior lawmakers were very busy, but partly perhaps due to the sensitive nature of the questions. In the final section of this thesis, on the limitations of this research, there is a longer explanation of this and copies of communication with Members of Parliament and their Staff.

CHAPTER 2. THE HISTORICAL SETTLEMENT

This chapter provides an overview of the Establishment in historical perspective. Many of the features of law-making, the role of Parliament and the scrutiny of the Ecclesiastical Committee that constitute the core subject of this thesis have to be located in a historical legacy of establishment. This relationship has significant features of both continuity and change, and both are relevant for evaluating the legal processes appropriately.

2.1 The historical background of the break with Rome

To understand the contemporary relationship between the State and the Church of England, it has to be seen against the background of underlying historical continuities. Following the adoption of Christianity as the Roman Empire's official religion, Christianity emerged as the legitimator of State authority and the single principal integrating force within European society[23]. The early Anglo-Saxon Church has been described as "a fountain of light, as a land of learned men, of devout and unwearied missions, of strong, rich and pious kings" (Stubbs). Although such a description sounds too idyllic, it reflects the relatively peaceful acceptance of Christianity in England helped no doubt by the fact that the first converts were the tribal kings and the religion spread downwards, not upwards as in the Roman Empire.

The Norman Conquest marked a new era in the relationship between church and state in England. William the Conqueror, while displacing most of the holders of higher ecclesiastical office, retained the bishops and abbots in his Great Council. The Archbishop of Canterbury and other bishops were requested "not to enact or prohibit anything but what had been first ordained by the King". William separated secular and ecclesiastical jurisdictions, giving temporal courts the right to prohibit ecclesiastical courts from meddling in secular matters (the definition of "secular" being left to the temporal courts). Significantly, the King also exercised the old right of "investiture" of bishops, confirmed by giving them a ring and a staff[24].

[23] Medhurst and Moyser. (1988), p 3.

From the twelfth century onwards, there was a rapid increase in the sense of ecclesiastical unity. This unity grew with the growth of Canon Law, of Papal influence, of crusading movements, and of clerical taxation from 1189. Paradoxically, at the same time, there was growing intolerance in Britain of Papal provisions and reservations, annates[25] and appeals. This resentment was made worse when they were being "exacted by Popes who were not only unscrupulous men but were also Frenchmen"[26]. In addition, Parliament had additional grievances when the Provisors and Praemunire Statutes[27] were ignored. Often the Crown and Papacy colluded to enable the Pope to thrust foreign favourites into many rich benefices, and as part of the bargain, the Pope allowed the King to suggest the nominee for a vacant Bishopric[28]. Fraught relations between the English Parliament and Rome were made worse by such instances of uncritical support (displayed by the King towards the Pope) and statements such as that by Pope Clement VI that "if the King of England wishes an ass to be made Bishop, he must have it"[29].

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[24] Dibdin, (1932), pp 20-21.

[25] The payment to the Pope of the first year's income of newly appointed Archbishops and Bishops.

[26] Dibdin (1932), p 28.

[27] The Statutes against "Provisors" was meant to prevent the Pope from providing a nominee to a Bishopric before it became vacant. The Statutes of Praemunire prohibited (under heavy penalties) Papal intrusions, especially the introductions into England, of Papal Bulls, without the leave of the Crown.

[28] Trevelyan (1946), p 42. Dibdin referred to this collusion as an alliance between the wolf and the shepherd against the sheep.

One consequence of the growing tension was that in 1366, Parliament repudiated the tribute to Rome which had been promised in 1213 and which had been paid in arrears since 1333. What was most significant in this Parliamentary revolt was that the driving force behind this resentment had more to do with the needs of the Exchequer than any express concern for the English church[30]. The principle – that church property, if abused, could be reclaimed for the state – had already been proposed by the English theologian Wycliffe (1325-1384). In 1410, his Lollard followers sent a petition through the knights of the shires that the lands of bishops and religious corporations should be applied to the endowment of 15 earls, 1500 knights, 6000 squires and 100 hospitals with £20,000 a year to go to the Crown. Confiscated monastic lands were already being used for new purposes such as the endowment of schools[31].

Matters however came to a head not with any act of Parliament, but with the breakdown in negotiations between Rome and the King's representatives in finding an amicable solution to end the marriage of Henry and Catherine of Aragon. The break with Rome transformed the "Church in England" into the "Church of England" and freed both church and state in England from the interference of Papal authority. The most significant factor that enabled this break was the consolidation of regal power in England, which was able to harness the antipathy between Parliament and Rome.

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[29] Dibdin (1932), p 28.

[30] Dibdin (1932), p 28.

[31] Winchester and Eton are two such examples.

Whether the Church of England correctly dates its foundation from the arrival of St. Augustine or from Henry VIII's proclamation of royal supremacy in 1534 may be a matter of personal conviction. The view of commentators such as Sir Lewis Dibdin was that, remarkable as it was, the Reformation constituted a continuation of what had been going on from long before. Nevertheless, while the Reformation built on old animosities and tensions, it did result in some accelerated developments. Henry VIII claimed the power of "external jurisdiction" exercised by the Pope as belonging to his kingship. On the other hand, he never claimed the "internal jurisdiction" of the church, which had been conferred directly or by devolution to the clergy by the Pope.

Prior to the Reformation, there were three sources of law for the Church. These were the canon law of Rome, the civil law of England and the provincial law of the Church of England.[32] Following the Reformation, a Royal Commission was set up under the 1533 Act[33] to examine the existing canon law and provincial constitutions of the Church. The Commission had the power (subject to royal assent) to abolish canon law and constitutions of which it disapproved, but it was not given the power to draw up new canons[34].

[32] Stubbs (1883) in Hill (2001), p 6.

[33] Act for the Submission of the Clergy and Restraint of Appeals 1533 (25 Henry VIII, c 19).

[34] The Commission did not come up with anything of substance and the Codes of Canon Law were only formulated and passed into law during the reign of James I in 1603 (of the 141 Canons of the 1603 Code, 97 were adaptations of previous Canons).

The 1533 Act allowed all Canons, Constitutions, Ordinances and Synodals Provincials which were already in existence to continue in force (till the Commission set up by the Act had completed its work) as long as they were "not contrariant or repugnant to the law, statutes, and customs of this realm, nor to the damage or hurt of the King's prerogative". Therefore as Mark Hill put it, canon law that was already in existence "which was not contrary to common law and prerogative remained in force, not by dint of any papal or other Church authority, but by virtue of statute[35]".

In 1534, the Convocations[36] declared that the Roman Pontiff had no "greater jurisdiction bestowed on him by God in the Holy Scriptures in this realm of England than any other foreign bishop". The legal expression of the break with Rome came in a series of Acts of Parliament[37]. In particular the Submission of the Clergy Act 1533 ensured that Convocations could no longer legislate without Royal Assent and established the power of the Monarch to appoint bishops and archbishops. The

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[35] Hill (2001), p 7.

[36] The two provinces of Canterbury and York have their own ancient ecclesiastical parliaments called Convocations. The Convocation was summoned by a Royal Writ. Following the 1966 Church of England Convocation Act the gathering of Bishops and inferior clergy does not automatically dissolve with the dissolution of the Westminster Parliament. Garth Moore and Briden (1985), pp 25-26.

[37] These were: i) The First Statute of Annates 1532, ii) The Ecclesiastical Appeals Act 1532, iii) The Submission of the Clergy Act 1533, iv) The Restraint of Appeals 1533, v) The Second Statute of Annates 1533 and vi) The Act of Supremacy 1534.

Supremacy Act of 1534 established the King as "the only Supreme Head in earth of the Church of England". The King was now in a position to exercise his personal authority over the Church, which could profoundly affect every department of its life and development.

One of the most far-reaching consequences of the break with Rome was to be the eventual emergence of Parliament as the supreme authority in the regulation of the Church. What is interesting is that while the King was essentially asserting his personal authority, he felt obliged to do so through Parliament rather than just the Convocations. The fact that the English Monarch chose to harness the resentment of Parliament in his move against Rome had possibly more to do with the distribution of political and economic power between the King and country in England, rather than any prior constitutional constraints[38]. Nevertheless, these decisions were in time to have far-reaching constitutional implications for relationships between the state and the Church.

Thus in 1543, the King's Book, which was a new exposition of doctrine based on the Bishop's Book prepared a few years earlier by the King without reference to the Convocations or Parliament, was approved by the Convocations and confirmed by an Act of Parliament. The Parliament's initial role in legitimising the Monarch's personal supremacy over the Church of England was gradually transformed into an assertion of

[38] See Tawney (1938).

its own authority over the Church as it gradually took effective control over all matters concerning the Crown[39].

Perhaps inadvertently, Henry VIII accelerated this process by undermining the authority of the Church Convocations and replacing it with that of Parliament for legislating on Church affairs. As a consequence, the promise set out in the Great Charter: "Quod Ecclesia Anglicana libera sit" (the Church of England should be free) was to remain an unrealised ideal. Although constitutional historians like Keir claim that Parliament was being used not to define, but merely to protect, true Christian belief, a foundation was actually being laid for a wider claim by Parliament[40]. In short, the Monarch had united spiritual and temporal authority while maintaining church and state as separate institutions.

According to Cornwell, the English Reformation "…was achieved by an act of nationalization…[41]". Officeholders in state and Church were required to take the oath as set out in the Act of Supremacy 1559[42]. One justification for Parliament having control

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[39] Medhurst and Moyer (1988), p 5.

[40] Keir (1964).

[41] Cornwell (1983), p 6.

[42] The individual had to "…utterly testify and declare in my conscience that the Queen's highness is the only supreme governor of this realm and of all other her highness' dominions and countries, as well in all spiritual or ecclesiastical things or causes as temporal, and that no foreign prince, person, prelate, state or

over ecclesiastical law was presented by the 17th century writer, Richard Hooker, who has often been described as an apologist for the Reformation writing in his book, Of the Laws of Ecclesiastical Polity that,

> Till it be proved that some special law of Christ hath for ever annexed unto the clergy alone the power to make ecclesiastical laws, we are to hold it a thing most consonant with equity and reason that no ecclesiastical laws be made in a Christian commonwealth without consent as well of the laity as of the clergy, but least of all without the consent of the highest power[43].

The basis of this close relationship of state and church in Hooker's view was driven by the presumption that:

> "...there is not any man of the Church of England, but the same man is also a member of the Commonwealth, nor any man a member of the Commonwealth which is not also of the Church of England, therefore as in a figure triangular the base does differ from the sides thereof, and yet one and the self same line, is

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potentate hath or ought to have any jurisdiction, power, superiority, preeminence or authority, ecclesiastical or spiritual, within this realm. Quoted in Cornwell (1983), p 6. Cornwell than went on to suggest that the "English reformation was anti-clerical, not only in relation to the bishop of Rome but,...in relation to all prelates". *Ibid.*

[43] Quoted in Cornwell, (1983), p 7.

both a base and also a side...that no person appertaining to the one can be denied to be also of the other...[44]".

Hooker went on to say that the fact that Parliament was to play an important role in this relationship was an indication of the importance of government and that "Parliament is a court not so merely temporal as if it might meddle with nothing but only leather and wool[45]". Hooker pointed out that "in matters of God" it may be natural to consider bishops and pastors of the Church as best suited to decide on the laws, however it was important to seek the general consent of those giving these laws their "… form and vigour...". According to Hooker, Parliament was the "competent authority" in Church affairs because without its legislative backing any rules made by the Church would not be considered as law. To illustrate this point, Hooker gave the example of a Physician and the sick and made the analogy that the admonitions and instructions of the Church would be meaningless if there was no general consensus that this was the right way[46].

[44]Chapter 1.2, Hooker/ p. 319, Folger.

[45] Chapter 1.2, Hooker/ p. 319 Folger.

[46] Hooker chapter 6.11/ Folger pp 403-404.

2.2 The influence of Parliament

Following the Reformation, the transformation of the role played by the King in the government of the Church was described by Powicke as a "revolution"[47]. Despite instances (prior to the Reformation) of secular and ecclesiastical authorities interacting with each other such as in the appointment of bishops, there had never been a merging of the two authorities at any time. Following the split with Rome, there was now widespread co-operation between

> "...laity and clergy, of royal councillors, lawyers, bishops and theologians. The guidance of ecclesiastical affairs was a matter of State. An Act of Parliament gave validity to every important change, the Act of the six Articles in Henry's reign, the two Prayer Books of Edward's reign. The King had the controlling interest in the formulation of articles in the one, the Council in the other reign. The bishops and officers of the Church were in fact the heads and executors of an administrative department of the State…[48]".

The importance of Parliament in this entire process is emphasised by Powicke who asserts that the Reformation

> "…was a parliamentary transaction. All the important changes were made under statutes, and the actions of the King as supreme head of the

[47] Powicke (1941), p 1.

[48] *Ibid.*, p 53.

> Church were done under a title and in virtue of the powers given to him by statute. Disciplinary action was administered...according to rules laid down in statutes or in virtue of authority allowed by the King in Parliament...any general action, even if it were concerned with doctrinal change or ritual, required secular sanctions. If the leaders or synods of the Church had attempted any changes without such sanctions they would have been liable to proceedings involving the pains and penalty of praemunire... (H)ence came the reluctance of the bishops to move a step unless they could carry the secular authorities with them and have legal protection for everything that they did[49].

Despite these dramatic changes in the way in which the Church was to be governed, Powicke suggests there was no significant change for ordinary churchgoers who played no part in the Church's ecclesiastical organization. According to him, as far as the laity in England was concerned, they continued with their duties and responsibilities, social and moral, as members of the Church. They were not faced by the dilemma of a decision between two forms of citizenship for the simple reason that the political organization was regarded as Christian, protecting their spiritual interests, not in opposition to them[50]. An interesting suggestion by Powicke for the acceptance and compliance of the Clergy with the new settlement was that they "…were Englishmen,

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[49] *Ibid.*, pp 34-35.

[50] Powicke (1941), pp 10-11.

with an Englishman's dislike of the foreigner…" which did not mean they were "…nationalists, but were very insular and English…[51]".

Some authors have seen the need for Henry VIII to use Parliament to enact legislation to formalise the break with Rome as the beginning of the ascendancy of Parliament; which led to Supremacy of Parliament[52]. Others see the role of Parliament in a more nuanced light. The idea that only Parliament could raise taxes had a long history, which predated the Reformation. It was as an extension of this right that Parliament took it upon itself the right to take away property by statute. So, many of the statutes, passed by the Reformation were not, "new" powers, which Parliament had acquired suddenly. Elton points out that most of the legislation passed by Parliament during the Reformation had to do with penal measures such as legislation to punish individuals professing loyalty to the Pope, imposing financial penalties on them, and enacting statues to acquire Church lands and monasteries. Parliament was therefore not as revolutionary in a constitutional sense as is sometime portrayed. Rather, according to Elton, Parliament "legalised the Reformation"[53].

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[51] *Ibid.*, pp 11-12.

[52] Elton suggests that writers such as A. F. Pollard seem to have overstated the significance of Parliament during this period.

[53] Elton (1997), p. 165.

The use of “preambles and the enactment of statues” in Reformation Statutes served an important purpose according to Elton[54]. They served the purpose of education and propaganda and reflected "what the government really wishes the nation to accept". He went on to say that Parliamentary statute could not by itself decree the supremacy of the monarch, which was conceived of as being derived from..

> God, but it alone can make the supremacy enforceable at law, in the law courts. Until parliament has decreed that certain activities (such as the denial of the supremacy or seeking out of appeals at Rome) are criminal and carry appointed penalties, there is no way in which the supremacy can be enforced on the country, especially on the laity: the king has no means of forcible and extra-legal coercion, and only statutes can add felonies and treasons, involving loss of life or member, to the body of law[55].

The urgency of enforcement made it necessary for Henry VIII to use the statutory route rather than just declaring "his supremacy by proclamation: had he wished to do so he would have had to give to proclamations powers they had never had"[56]. Parliament alone could make laws that were enforceable and this reflected the formalization of law and enforcement that had already happened in England by the sixteenth century. A related point was made by Sir William Anson who pointed out that every religious

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[54] *Ibid*.

[55] *Ibid*.

[56] Elton (1997), p 165.

society was as a result necessarily subordinated to Parliament "because Parliament may make the profession of its opinions unlawful, may subject the performance of its acts of worship to a penalty, may impose tests which disqualify its members for office or franchise" and goes on to say that "every religious society, large or small, which enters into relations of property or contract, must necessarily be liable to have its doctrines discussed in a court of law[57]".

Describing this era, Powicke suggested that,

> The reformation in England was a parliamentary transaction. All the important changes were made under statutes, and the actions of the King as supreme head of the Church were done under a title and in virtue of the powers given to him by statute...If the leaders or synods of the Church had attempted any changes without such sanctions they would have been liable to proceedings involving the pains and penalty of praemunire...(H)ence came the reluctance of the bishops to move a step unless they could carry the secular authorities with them and have legal protection for everything that they did[58].

Dickens describes the break with Rome as an "act of State", and a "dual revolution, severing the English Church from the Papacy and subjugating it to the control of the Crown in Parliament" in one swoop. This built on the intellectual foundation already laid by previous anticlerical and erastrian opinion among some sections in English

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[57] Quoted in Henson (1939), p 47.

[58] Powicke (1941), pp 34-35.

society such as early Tudor writers like Marsiglio and Wycliffe[59]. In his book on *Great Britain: Identities, Institutions and the Idea of Britishness*, Keith Robbins suggests that the view of Wycliffe as early as in the statute *de heretico comburendo* (1402) that holding heretical views was a political crime, punishable by death was an indication of the "intimate relationship between Church and state" and something that would "take many centuries...to be abandoned that the enforcement of religious uniformity was a responsibility of the secular power[60]".

2.3 The role of the Church of England in Nation-building

There is also another element to these changes. The Statutes of Reformation also served as tools that allowed the monarch to tie the nation together and forge the idea of nationhood. By giving the country a sense of separateness from others and unity within, the established Church helped to create a greater sense of identity among its people. Hobsbawm makes this point eloquently in his book *Nations and Nationalism since 1780* when he says:

> "There is no more effective way of bonding together the disparate sections of restless people than to unite them against outsiders[61]".

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[59] Dickens (1964), pp 83-85

[60] Robbins (1998), p 41.

[61] Hobsbawm (1990), p 91.

Colley echoes this view when she suggests that

> "…It was their common investment in Protestantism that first allowed the English, the Welsh and the Scots to become fused together, and to remain so, despite their many cultural divergences. And it was Protestantism that helped to make Britain's successive wars against France after 1689 so significant in terms of national formation. A powerful and persistently threatening France became the haunting embodiment of that Catholic Other which Britons had been taught to fear since the Reformation in the sixteenth century. Confronting it encouraged them to bury their internal differences in the struggle for survival, victory and booty…[62]".

The real success of this strategy can be seen during the reign of Elizabeth I. The Queen's public policy was described by Moorman as an attempt,

> "…to keep the Church in England free from foreign influence, whether from Rome or Geneva, and to allow it to develop on its own lines in accordance with the growing patriotism and national pride of which the queen herself so soon became the symbol. Elizabeth distrusted the papists because of their allegiance to Rome, and the Protestants because of their allegiance to Geneva. People who took their orders from some continental power were not whole-heartedly

[62] Colley (1992), pp 367-368.

English. And that was what Elizabeth wanted - an *English* church designed to meet the spiritual needs of the English people…[63]"

2.4 The role of Parliament

Goldsworthy quotes Sir Thomas Smith's description of the 16th century Parliament as a place where "every Englishman is understood to be there present…(a)nd the consent of Parliament is taken to be every man's consent…" as evidence of the prevailing view among intellectuals of that period[64] that Parliament was truly if symbolically representative of the population[65]. As further evidence of the eminence of Parliament at that time, Goldsworthy cites Chief Justice Popham who suggested that Parliament's authority was superior to that of any judge. Popham stated that statute was of "greater authority than the particular opinion or conceit of any judge…which ought to bind all, and to which all ought to give credit[66]".

This assertion that the 16th century Parliament was truly representative and therefore had the authority to pass whatever statutes it deemed necessary may seem strange by

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[63] Moorman (1953), pp 212-213.

[64] Men like Francis Bacon, Richard Hooker, William Lambarde and Christopher St German.

[65] Goldsworthy (1999), p 68.

[66] Dillon v Fraine (1595) Popham's Reports 70, 79; 79 E.R. 1184, 1192 (reported as Chudleigh's case in 1 Coke's Reports 120a; 76 E.R. 270), quoted in Goldsworthy (1999), pp 68-69.

modern standards, but historians such as Elton have suggested that during the Reformation period, the representatives in Parliament reflected the interests of those who had political and economic power in society, and therefore the people who formed and expressed opinions. Elton makes the point that compared to other contemporary European States, the English political nation was large and that the Commons was the largest assembly in absolute terms and also in proportion to the population[67]. Elton, points out that "…all through the 1530s every important step was embodied in statutes made by king, lords, and commons – for it must be remembered that the king was and is as much a part of parliament as are the commons…[68]". Linda Colley is less sanguine about 17th and 18th century Parliamentarians who she refers to as "Tory country gentlemen" with "élite attitudes" and "élite patriotism" and about the Parliament, dominated by men "...drenched in the classics with the chance to play the Roman senator. It drew on whatever rhetorical ability they possessed, and it catered to their sense of civic worth...[69]." Nevertheless, Elton's view is more relevant because what matters is that the English parliament included representatives from a broader spectrum of the politically significant classes of the time compared to other European states, and it was therefore more representative given the standards of the time.

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[67] See Elton (1974).

[68] Elton, (1997), p 164.

[69] Colley (1992), p 50. Pointing out that many of these Parliamentarians "were likely to have gone on the Grand Tour" and therefore aware of the British Parliament's importance which "distinguished its government from that existing in almost every other European state". ibid

The Reformation also had an impact on the composition of the House of Lords. The dissolution of the monasteries (1535-1539) meant that around twenty-seven members of the House of Lords disappeared with the withdrawal of the abbots although many of the bishops who supported the reforms remained[70]. Many new lay peers were endowed out of monastic property. There was thus a gradual increase in the number of lay lords. In the first year of Henry VIII's reign there were thirty-six lay lords. By the last year of the reign of Elizabeth I this had increased to eighty-one. The personal stake that the new Parliamentarians had in maintaining the changes brought about by the Reformation was therefore also increasingly getting stronger.

In addition to this, during the reign of Edward VI, there was an ascendance of Erastian principles[71] where the government seemed to disregard Church assemblies and officers and chose Parliament as the instrument of its action[72]. According to Keir, when the first Book of Common Prayer was laid before Parliament in 1549, it was doubtful whether this work was ever seen or approved by the Convocation. The clergy could no longer determine the form of worship (with its doctrinal implications) and detailed

[70] These bishops were the predecessors of the Church of England bishops in the House of Lords.

[71] Follower of Erastus, a Swiss physician (d.1583), who held that the church is subject to the state in matters of government and discipline.

[72] Keir, D. (1964), p 72.

arrangements for the manner in which the communion service was to be conducted were laid down by order of the Council[73].

Erskine May points out that the link between church and state following the Reformation was far more intimate than before as there was no longer a divided authority. "The crown was supreme in state and church alike." He goes on to say that

> "The Reformed church was the creation of Parliament: her polity and ritual, and even her doctrines, were prescribed by statutes. She could lay no claim to ecclesiastical independence. Convocations were restrained from exercising any of its functions without the king's license. No canons had force without his assent; and even the subsidies granted by the clergy, in convocation, was henceforth confirmed by Parliament. Bishops, dignitaries and clergy looked up to the crown, as the only source of power within the realm...the constitution of the church was identified with that of the state; and their union was political as well as religious. The church leaned to the government rather than the people; and, on her side, became a powerful auxiliary in maintaining the ascendancy of the crown, and the aristocracy[74]."

[73] *Ibid.*

[74] May (1882) pp 67-68.

It is clear that following the break with Rome and the flurry of Statutes passed by Parliament to "legalise" this break, the authority of Parliament over the Church of England had now become entrenched. The extent and depth of this entrenchment is perhaps best illustrated by the abortive attempt by the Catholic Queen Mary to reverse the rupture with Rome. Mary did not try and restore the Catholic faith and Papal authority by acting on her own. Only in Parliament could the revolution be undone. In effect, Mary proceeded by inviting Parliament to destroy its own handiwork by repealing all the ecclesiastical legislation, which had been passed since 1528 during the reigns of Henry VIII and Edward VI. This strengthened the presumption that Parliament's approval was required in the exercise of royal supremacy over the Church. Nevertheless, the Marian reforms did appear to weaken the authority of Parliament at least for the time being as well as threatening to reverse the break with Rome. The key Acts of Reformation were repealed, though Parliament made it clear that no proposal for the restoration of ecclesiastical property would obtain its sanction[75].

After the accession of Elizabeth I to the throne, the Marian reforms were in turn reversed and once again the relationship between Church and State was in a flux. This made it imperative for Elizabeth to consolidate the Reformation and thereby her own claim to the throne by insisting on absolute unity on this issue. As Erskine May points out, this was done by denying the liberty of conscience to her subjects and attaching civil disabilities to those dissenting from the state church. For example, the oath of supremacy was required to be taken as a qualification for every ecclesiastical benefice

[75] Keir, (1964), pp 75-76.

or civil office under the crown and this was later extended to members of the House of Commons (5 Eliz. c. 1). In addition to this, the act of uniformity (2 Eliz. c. 2) enforced with severe penalties the rituals of the established church and the attendance of its services.

One justification, which is suggested by Erskine May, for the strict limitations on the rights of Catholics was that they threatened the security of Elizabeth's reign. Catholics were effectively contesting Elizabeth's right to the crown and therefore the Catholic religion came to be associated with treason "and the measures adopted for its repression were designed as well for the safety of the state, as for the discouragement of an obnoxious faith[76]" (13 Eliz. c. 2). The anti-Catholic bias is described by Linda Colley in her book *Britons: Forging the Nation 1707-1837:*

> At its most formal, the division was enshrined in the law. From the late seventeenth century until 1829, British Catholics were not allowed to vote and were excluded from all state offices and from both houses of Parliament. For much of the eighteenth century they were subject to punitive taxation, forbidden to possess weapons and discriminated against in terms of access to education, property rights and freedom of worship. In other words, in law - if not always in fact - they were treated as potential traitors, as un-British[77].

[76] May (1882), p 63.

[77] Colley (1992), p 19.

For instance, in the case of the anti-Catholic Gordon Riots in London in 1780 (coinciding with a war against France), Colley points out that an important factor driving motivating the rioters was the sense of danger and insecurity in society. Catholics (like witches in an earlier century) "became scapegoats, easy targets on which their neighbours could vent fear and anger. The slang adjective most commonly applied to the Catholics was 'outlandish', and this was meant quite literally. Catholics were not just strange, they were out of bounds. They did not belong, and were therefore suspect[78]."

2.5 Toleration

These attitudes did undergo a change in the early part of the nineteenth century[79], among what Moorman describes as "more thoughtful people". According to Moorman, this period saw the

> "…spread of more intelligent ideas about the nature of the Church. For long the Church had been looked on, by the majority of its members, as little more than a department of the State, the religious aspect of the national life. Gradually people were beginning to realize that this was not enough, that the Church was a divine institution…that its authority was

[78] *Ibid.*, p 23.

[79] A good overview of changing attitudes is presented in Chapter 5 by Robbins in his book *Great Britain: Identities, Institutions and the Idea of Britishness* (1998) on "Truth, Uniformity and Toleration: Making a British Compromise? c. 1500-1750".

not given to it by the State…that it had a life of its own and must therefore be free from external control if it was to carry out its responsibilities…[80]".

According to the historian Gilbert, the repeal of the Test and Corporation Acts in 1828 and the Roman Catholic Relief Act in 1829 "...symbolized dramatically the failure of the old monopolistic conception of the Establishment...the passage of the repeal legislation was evidence of the power of extra-Establishment forces within the society: forces which might reasonably be expected sooner or later to launch an offensive aimed at securing full religious equality. Because repeal had long been contested by the Church its coming was an index of the Church's vulnerability...[81]".

By the end of the 19th century, Parliamentarians belonging to different Christian traditions, especially from Scotland and Ireland had been introduced. This gave rise to the anomalous situation, not foreseen when the union of church and state was initially formulated, by which representatives in parliament were exercising de facto powers of legislation (that had belonged to the Convocations). Now some of these Members were not members of the Church of England[82].

[80] Moorman (1953), pp 335-336.

[81] Gilbert (1976), p 125. Gilbert points to the debates in Parliament on the Irish Temporalities Bill of 1833 where Members such as Lord John Russell (suggested that Church funds could be confiscated if it could be used more profitably for moral and religious improvement) and Sir Robert Peel (argument that religious Establishment should be treated in the same way as any other great corporate interest) as indications on how the bond of Church and State was now subject to "public scrutiny". ibid.

Following the reforms introduced by Elizabeth I, the equation between Church and State remained largely unchanged and it was only at the end of the Great War that there was a change in the status quo. These changes will be discussed in the next chapter as we look at the Church of Assembly (Powers) Act 1919.

2.6 The historical background and World War I

The evolution of the relationship between Church and State as embodied in the Establishment of the Church of England went through very significant changes in the early part of the twentieth century. At its heart were very deep social changes driven by the economic transformation of the country and also by the mobilization of large numbers of people in the First World War. The extension of the franchise, the growth of the union movement and the growing role of women in the economy and in politics all promised to change the nature of parliamentary democracy in England. This was the context in which the Enabling Act in enacted, an Act that sought to preserve key aspects of the Church in a context of rapid change. But the Act also defined the legal setting for the further evolution of the relationship between Church and State in England.

The impact of the First World War on the social fabric of England was profound. It was not just the loss of a generation of young men who fell in the war. The traumatic years of war and sacrifice transformed priorities in peoples' lives. Change was inevitable as

[82] May (1882), p 226.

there was a change in attitudes and aspirations of those men who survived the war and came back to England. In the battle field the class divisions that had existed in society were broken down and for the first time, many men came into close proximity and contact with other men from very different socio-economic and political backgrounds.

This was not just restricted to soldiers in the battlefield. It also applied to members of the Clergy who had volunteered to join the war effort. Prior to the war, senior members of the Church and the ordinary Clergy were also separated by the social divide that was endemic in British society in the early 20th century. It was against this background that a push for greater autonomy from State control came from within the Church.

An interesting description of this period can be found in Alan Wilkinson's book on *The Church of England and the First World War*. In the first two chapters, Wilkinson looks at the splits within the Church over whether members of the clergy should get involved in direct combat. Unlike France and Germany, till January 1916, Britain had relied on a "voluntary system" to maintain the armed services. When conscription was finally introduced, members of the clergy were exempt from joining up[83]. For some senior members of the Church of England, this put the Church in an awkward position. Wilkinson describes how prior to compulsory conscription, members of the Church of England clergy such as the Bishop of London used the pulpit to encourage men and women to volunteer and in the *Recruiting Supplement* in *The Times*[84], the Archbishop of

[83] The proposal is contained in the First Schedule to the Military Service Bill stated that among the exemptions are "men in Holy Orders or regular ministers of any religious denomination."

[84] 3 November 1915, Wilkinson (1978), p 33.

Canterbury encouraged "service to the nation" by volunteering. During the debate on the Military Service (No. 2) Bill[85] in the House of Lords on a law enforcing compulsory conscription, the Archbishop of Canterbury made these remarks:

> My Lords, I should be sorry if no voice were heard from the Episcopal Bench upon an occasion so important as this. I desire with all my heart to support this Bill, believing as I do, notwithstanding the criticisms[86] which we have heard to-night and outside, that it is a plain and straightforward and vigorous endeavour to meet a situation which is extremely difficult. We are face to face with facts to-day which have no parallel in the history of our country[87].

On the following day, in the House of Lords, the Archbishop of Canterbury directly addressed the "exemption" clause in the Military Bill, where he clarified the position of the Church by saying that:

> It has been suggested by some that we Bishops and others who further this want the clergy to evade the obligation of bearing their part and doing their share in this mighty national effort to roll back a great wrong and to establish what is right. Nothing could possibly be further from the fact. There is no question, if we look back along the history of Christendom, that the technical law of the

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[85] HL Deb 25 January 1916 vol 20 cc 970-1022

[86] Critics such as Earl Russell who felt that the "resort to compulsion...presents a tarnish on our magnificent voluntary effort". HL Deb 18 May 1916 vol 21 c 1114

[87] HL Deb 25 January 1916 vol 20, c 1016.

> Church forbids the clergy to be combatants. Canon law has been abundantly clear with regard to the shedding of blood by those who are in Orders...[88]

The Archbishop went on to say that at that moment there were already 600 to 700 clergy from the Church of England who were abroad and supporting the soldiers and the contribution of the clergy in this time of war was to be "the ministers of the Faith, who should be consolers of the sorrowing, strengtheners of the weak-hearted[89]". The speech by the Archbishop was then endorsed by the Earl of Selborne, a Government minister who said that:

> His Majesty's Government sympathise with the point of view which he set forth, how thoroughly we understand the position which he has asserted for those in Holy Orders and for ministers of the different Churches, and how gratified we are that he gives his cordial and complete support to the provision in the Schedule, which deals with those citizens[90].

Not every senior member of the Church of England supported this view, and once again it was Hensley Henson whose views were contrary to those of the Archbishop in this matter. Henson felt that by being non-combatants, the influence and effectiveness of the Chaplains with the troops in the battlefield was compromised[91]. That this may have

[88] HL Deb 26 January 1916 vol 20 c 1039.

[89] *Ibid.*, c 1042.

[90] *Ibid.*, c 1061.

[91] Discussed in his book *Retrospect of an Unimportant Life* (vol 1), Wilkinson (1978), p 35.

been the case in some instances can be seen from the quote in Wilkinson's book where Frank Richards a private soldier summed up the contribution of the clergy in the war effort thus:

> "...a funny crowd: they prayed for victory and thundered from the pulpits for the enemy to be smitten hip and thigh, but did not believe in doing any of the smiting themselves...[92]".

This debate in 1916 with its favourable outcome from the point of view of the Church of England, which emerged with its principles intact, leads to an obvious comparison with the debate in Parliament on the incorporation of the European Convention of Human Rights into English Law in 1998. The ease with which the Clergy of the Church of England were "exempt" in 1916 from an obligation, which applied to virtually all of the rest of the population can be contrasted with the failed attempt at "exemption" by the Church of England from some of the regulations of the Human Rights Act. In less than a hundred years, the Church appeared to have lost its ability to argue and win special dispensation for itself from legislation that some felt was abhorrent to its principles, oaths and philosophy.

2.7 A new vision

Church State relations remained relatively stable till the First World War because England's social structure ensured that the leaders of Church and State continued to

[92] *Old Soldiers Never Die* (1964 edition), p 301 quoted in Wilkinson (1978), p 39.

share many deeper values despite their constitutional and institutional differences. Many of the senior Members of the Church of England came from the same social and educational background as Members of Parliament and senior military officers and bureaucrats but this overlap was becoming less and less marked over time[93]. An anecdote from as late as the 1930s retold by Iremonger in *William Temple* is one of many that allude to the close social ties between politicians and churchmen. William Temple, the Archbishop of York and the Prime Minister Stanley Baldwin were standing together on a terrace at Bishopthorpe along the river Ouse. A passenger on a passing barge remarked "Keepin' better company today, I see." Baldwin's response to the comment was "I wonder for which of us that pretty compliment was meant" and is referred to by Iremonger as an illustration in this context.[94]

These relationships did not, of course, change rapidly. Referring to Church and State relations in the era immediately after World War I, Hastings pointed out that,

> The ease, the informality as well as the formalities of an interlocking relationship at every level between civil and religious authority was what Establishment meant. England's secular establishment was riddled with

[93] Wilkinson gives the example of some of these close friendships and connections such as General Lyttelton being related to Bishop Talbot by marriage and Archbishop of Canterbury being close friends with Lord Bryce. Wilkinson (1978), p 36.

[94] Quoted in Hastings (2001), p 663.

ecclesiastical woodworm in such a cunning and natural way that it displeased almost no one[95].

Nevertheless, the winds of change were in the air and both the Church and its parliamentary allies realized the importance of making changes that would protect the Church given the likely future changes in the nature of parliament that were now becoming clear. The early part of the twentieth century was therefore a period of change and challenge for Church-State relationships. On the one hand, many of the senior politicians, parliamentarians and opinion-makers still shared the same social values as many of the leaders of the Church. But it was also becoming clear that parliament and society was changing and this was therefore the time when accommodating changes could be introduced by Church leaders to amend the legislation guiding the law-making affecting the Church. In particular, it had become clear during the war years that Parliament would no longer have the time to play a "part" in Ecclesiastical legislation in the post war era. The changes in domestic policy priorities as soldiers returned from the war and the necessity of dealing with foreign policy issues in a changed world with shifts in the balance of power were not only likely to keep Parliament busy, they were also portents of deeper changes in the social balance that perhaps concerned the Church even more. Parliament could be expected to give Church matters even less time in the future not only because they may have other priorities, but more worryingly, they may be less interested in the Church. But it was not surprisingly the work load of parliament that was most often referred to by reformers seeking to achieve greater autonomy for the

[95] *Ibid.*, p 664.

Church in this changing environment. Indeed, struggling with its bourgeoning work load, there seemed little appetite amongst Members of Parliament to hold on to their historical responsibility of making laws for the Church of England when there were so many other pressing needs to address in the House.

In his chapter in the series on the *Studies in Church History* (Volume 12), David Thompson suggests that the "charisma" of William Temple and Dick Sheppard was such that a lot of the credit for the changes of that period was unfairly attributed to them and the Life and Liberty Movement. Thompson feels that this has tended to overshadow the significant role played by Viscount Wolmer and Randall Davidson in getting greater legislative freedom for the Church of England from Parliamentary control. Thompson presents an interesting portrayal of the conflicts and divisions within the Church and describes the sequence of events and decisions which eventually led to the Bill being presented and passed by Parliament[96]. In fact, while the role of individuals can be over or under-represented in particular historical accounts, what is perhaps more important is that these debates were taking place in a changing historical context where the social arrangements underpinning the relationship between Church and State were themselves facing significant changes.

[96] His comment that the "political success of the enabling act requires a political explanation" encapsulates the essence of his chapter which goes into all the open and the more nuanced divisions that was prevalent in the Church at that time. Thompson (1975), p 383.

The war years saw an increase in debates and discussions within the Church, and in particular within the Representative Church Council of the Church of England. The Representative Church Council, which was composed of members from the Canterbury and York Convocations and limited lay representation, had become increasingly conscious of the need to redress the lay imbalance. This was the first step before the Church body could proceed with its claim that it reflected the interests of all its members and was more ably suited to formulate legislation for the Church of England[97]. This movement was propelled forward by men like Lord Halifax, Viscount Woolmer and Sir Alfred Cripps who were able to act as a bridge between the Church and the corridors of power at Westminster because they were both senior parliamentarians as well as being deeply sympathetic to the concerns of the Church. In addition, the Church had the "home" advantage of having senior Members of the Church sitting in the House of Lords in their role as Lords Spiritual. The close social and political links between many of the leading parliamentary and Church leaders at this time helped in managing this discussion, and not surprisingly, the outcomes often reflected the interests of the Church.

[97] See Thompson (1975), p 384 for a timeline of these changes, starting with the Selborne Report in 1916 and amendments made in 1918 on who could vote for the candidates standing for the parochial church council. All of which eventually led to the proposal for legislative freedom for the Church being put before Parliament in February 1919.

2.8 Centralization and Change

In another significant development during this period (that probably paralleled developments in other parts of the English body politic at that time), the Church began to operate in a much more centralised manner during the war years. This provoked the then Dean of Durham, Herbert Hensley Henson[98] to write a piece in the *The Times*[99] entitled "A Warning and a Protest". Henson expressed his concerns that local independence was being replaced by "centralized rule" which carried the risk of the "interest, personal and partisan" of those who formed the core at the centre becoming all important[100]. Henson described this as a "silent revolution" in the National Church, which would make the "expression of dissent extremely difficult" in the future. He ended his letter by suggesting that these changes were happening at a time when the

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[98] "Henson, Herbert Hensley (1863-1947)", *Oxford Dictionary of National Biography* [http://www.oxforddnb.com/view/article/33825, accessed 1 July 2011]. Henson was ordained deacon in 1887 and priest in 1888, and was appointed to the All Souls living of Barking in 1888. Following his appointed as Chaplain of Ilford Hospital in 1895, he became more involved in the political debates of the time and was a prolific writer. Henson served as the Dean of Durham from 1912 and later became the Bishop of Durham in 1920. His most controversial appointment was the one between those two positions in Durham, which was his appointment as the Bishop of Hereford in 1918. His consecration as Bishop aroused strong opposition from some Anglo-Catholics within the Church.

[99] All of Henson's letters can be accessed from the *Times* Digital Archives which is available online. There are also two volumes of Henson's letter compiled in a book. *Letters of Herbert Hensley Henson*, (ed.) Evelyn F. Braley, (1950) and *More letters of Herbert Hensley Henson : a second volume*, (ed.) Evelyn F. Braley, (1954).

[100] Henson used the media to make public his concerns over these changes and also raise concerns about senior members of the Church of England There are published letters between Bishop Gore and Henson which show the hostility between them. Findall (1972), p 298.

"public mind is filled with other interest", making it impossible to have an ecclesiastical discussion on these changes in the Church of England[101].

There is no doubt that the Church was undergoing a transformation in this period. Possibly with the exception of the players within the Church and later in Parliament who were driving these changes, the average lay worshipers of the Church of England were not debating these changes with great enthusiasm or opposition. Set against the traumatic times in which these changes were occurring, this is not surprising. Not for the first time in his life, it seemed that Henson was isolated from the mainstream views of the majority of the senior clerics of the Church of England of the day. Henson was not deterred and in a piece written for *The Times* entitled the "National Church of the Future" Henson made an emotional appeal to preserve the historical Church-State relations as they were. He stated that the "framework of the National Church lies ready in our hand in the Established system. Let us treasure it...". He warned against the "shifting sands of political expediency" driving the contemporary changes[102]. Henson pointed out that

> The Church of England differs from every other Church in being shaped and ordered in accordance with this national character. So long as this is maintained

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[101] *Times* 25 November 1916.

[102] Writing in *The Times* in 1919, Henson suggested that the Church of England would cease to be "the Church of the English nation, in which every Englishman has rights, and for which every Englishman has responsibility".

> and realized, the Church of England cannot rightly or reasonably be regarded simply as one denomination among many.

Thus, while the mainstream of Church and State were worrying about how to preserve the Church from changes in society that threatened to make parliament more representative of society if not more secular, Henson was concerned that the Church must reflect the national character whatever it was. This was not just a doom and gloom article. On an optimistic note, Henson suggested that the Establishment of the Church of England enshrined "the memory of a great past" and ushered "the prophecy of a great future". He concluded by saying that the National Church of the future would be "larger, more tolerant, less concerned with a legally enforced uniformity, more watchful of the generous variety of spiritual types[103]".

Not surprisingly, Henson was opposed to and disappointed by the changes brought about by the mainstream in their attempts to insulate the Church from an increasingly disinterested parliament. He suggested in his article in *The Times* on 15th December 1919, in a piece entitled, "Church and State – a Bill passed an ideal destroyed" that the National Church had been reduced to a status of one denomination among many.

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[103] *Times* June 23 1919.

2.9 The Selborne Report

The outcome of the deliberations of the mainstream leadership of Church and State was the Selborne Report[104], which became the foundation upon which the twentieth century relationship between Church and State came to be based. A highly influential report, its proposals formed the basis of what later came to be known as the 1919 Enabling Act. It proposed radical changes in the ways in which legislation for the Church of England was to be formulated and endorsed. The core issues and constitutional principles of the Selborne Committee looked at issues such as why the State should still have a "veto" over Church legislation, why Parliament could no longer claim to be the voice of the laity as Parliament's composition was no longer exclusively Church of England and many MPs were not knowledgeable on Ecclesiastical matters or even interested in Church issues. The Church of England therefore needed to widen and improve its lay representation in its decision-making bodies and this part of its recommendations appears to be relevant even today. Almost a century after the Selborne Report, any Committee looking at Church-State relations will have to consider similar issues.

The remit of the Selborne Committee was clearly stated at the beginning of the report:

> That there is in principle no inconsistency between a national recognition of religion and the spiritual independence of the Church, and the Council request

[104] The membership of the Selborne committee was interesting as it had a substantial lay component in its composition. As pointed out by Cranmer, Lucas and Morris (eds.) (2006), p 49. The Committee had "five peers, two bishops, six MPs and a total of ten ecclesiastics including the two archbishops". A "who's who" of individuals who were concerned with Church of England issues in early 20th century England.

> the Archbishops of Canterbury and York to consider the advisability of appointing a Committee to inquire what changes are advisable in order to secure in the relations between Church and State a fuller expression of the spiritual independence of the Church as well as of the national recognition of religion.

The Committee suggested that the Church of England was "paralysed...because it had not the power to adjust the organisation...which it inherits from past centuries to the deeply changed conditions of the present day[105]". The main problem (as they saw it), that could explain why the "wheels of the ecclesiastical machine creak and groan and sometimes refuse to move" was "Parliament[106]".

In Chapter II of the Report, a brief outline is presented of the history of the English Church, starting with the arrival of Christianity in this island in 200 A.D. After going through all the changes in State and Church relations since the arrival of Christianity, the Committee pointed to the 1689 decision to grant toleration to Nonconformists as a turning point in Church-State relations as not only did this remove the "legal obligation" in society to adhere to the Church of England but Parliament also ceased to be "an assembly of churchmen" as the Act of 1689 allowed persons of "any, or no, religious profession" to become a Member of Parliament[107]. The end result was that the "direct

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[105] *Report of the Archbishops' Committee on Church and State* (1916), p 2.

[106] A Parliament which they saw as in ,"no sense a church assembly" and therefore "not the right body" and which in any case seemed to have no time to devote to Church matters. *Ibid.*, pp 2-3.

influence of the church laity upon the government of church affairs was minimised almost to the point of obliteration[108]". The report cited another reason for the legislative standstill which was that Parliament had "neither time nor inclination nor knowledge for dealing with ecclesiastical affairs[109]".

In Chapter V of the Report, the Committee clarified that they had looked at the Disestablishment of the Church of England as one way of "securing spiritual independence" but the majority view was to maintain the historic link between Church and State and it was within these boundaries that the Committee looked for a way forward to resolve the issues to do with Church legislation. The suggestion was that a Church body should be given the authority to "legislate on ecclesiastical matters" but this was to be:

> "...subject always to a veto on the part of the Crown and of Parliament. Such legislation would be doubly operative, binding those concerned both as churchmen and as citizens...[110]".

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[107] *Report of the Archbishops' Committee on Church and State* (1916), p 23.

[108] *Ibid*.

[109] The report gave a breakdown of Church Bills that had been presented to Parliament in the years from 1880-1913 and the success rate of those Bills approved by Parliament. 217 Church of England Bills were presented to Westminister, of which 33 were passed, 183 dropped and one was rejected. As a comparison, for Bills dealing with Nonconformist issues, out of 74 Bills, 25 were approved (of which 24 were to do with trust deeds of chapels) and 49 bills were dropped. The numbers seemed to indicate to the Committee that Parliament was an unsuitable body to pass legislation for "established and of non-established bodies. *Report of the Archbishops' Committee on Church and State* (1916), p 29.

The report went on to say that:

> That the veto of the State need not involve the sacrifice of spiritual independence, since, in the last resort, the Church may, at the cost of disestablishment, assert its inherent rights; but we recognise that in any form of establishment the State must have power to decide whether any legislation proposed by the Church would render the continuance of state recognition undesirable or even impracticable[111].

The "Enabling Bill" in Appendix III[112] of the Report was presented a few months later before Parliament as the draft for the National Assembly of the Church of England (Powers) Bill. In his speech in the House of Lords, presenting the Bill before the House, the Archbishop of Canterbury pointed out that this Bill was the result of a long process of consultation by the Church of England which began when he became Archbishop in 1903. The Selborne Committee was appointed on the recommendation of the Representative Church Council (consisting of 41 Bishops, 279 clergy and 392 laity) which the Archbishop of Canterbury described as "the best representative body that we can fashion...to consider the advisability of appointing a Committee to inquire what changes are advisable in order to secure in the relations of Church and State a fuller expression of the spiritual independence of the Church, as well as of the national recognition of religion." The Archbishop went on to list the members of the Selborne

[110] *Ibid.*, p 49.

[111] *Report of the Archbishops' Committee on Church and State* (1916), pp 49-50.

[112] *Report of the Archbishops' Committee on Church and State* (1916), pp 91-93.

Committee which he described as "exceedingly strong", mentioning Members of Parliament such as Lord Selborne, Arthur Balfour and Sir William Anson (who died in the course of the proceedings) and influential lay participants like Sir Lewis Dibdin, the Master of Balliol and also "two working men, Mr. Mansbridge and Mr. Kemp". He concluded by saying that "...it would be difficult to find a Committee more representative of the Church in all its varieties of thought and experience than that Committee... [113]."

In presenting the Bill to Parliament, the Archbishop also pointed out that it was important to understand the composition of and depth of the work done by the Selborne Committee as

> "...it has sometimes been said that these things ought to be looked into by a Royal Commission, and I want to point out how careful that body was. It sat for a very long time. It was appointed in 1914, and it did not report till July 1916, and the reason is evident. They had taken enormous pains to go into this matter thoroughly, and the Report which they published is a volume of 300 pages, which was signed unanimously, though there were some reservations on points of detail. That has formed the basis of the action which we are now taking...[114]"

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[113] HL Deb 03 June 1919 vol 34 cc 984-985

[114] *Ibid*.

The Bill therefore came to parliament with the strong support and endorsement of the Church. Given the social composition and therefore the shared social values of the majority of the members of the Selborne Committee, this was hardly surprising.

CHAPTER 3. THE PASSAGE OF THE 1919 ENABLING ACT

The Enabling Act thus came to Parliament for approval after it had already won the strongest approval from the leadership of the Church. The recommendations on which the Bill was based came from a committee that largely represented the social consensus at the apex of English society on which Church-State relationships were based till the First World War shook these foundations. It is fair to see these recommendations as representing an attempt to preserve the interests of the Church while maintaining the broad structure of Establishment. It sought primarily to ensure that the preservation of Establishment did not unduly dilute the autonomy and interests of the Church in a changing social context that was also likely to change the composition and interests of parliament in the years to come. Of course there were other strands in the social discourse driving the passage of the Act.

A detailed description of the internal debates taking place within the Church during the war years is beyond the remit of this thesis. However, this section gives a brief overview of the changes taking place in the relationship between Church and State during the critical war years and the period leading up to the passage of the 1919 Act. Clearly a break with Parliament would have been too radical a step for the Church. The transformation of the "Church in England" to the "Church of England" was in partnership with Parliament. The 1919 Act maintained that relationship, albeit through the bridge of the Ecclesiastical Committee.

3.1 The First Steps

There are some interesting accounts of this period in Kenneth Thompson's[115] *Bureaucracy and Church Reform: The Organizational Response of the Church of England to Social Change 1800-1965* and in Alan Wilkinson[116] book *The Church of England and the First World War*. Contemporary accounts by members of the Church[117] also provide a sense of the political flux and deep divisions over the status of the Church within society and its relationship with the State. In addition, divisions within the Church were described by Flindall as a conflict between "two schools of thought." Flindall describes the conflict between two senior Church figures, Charles Gore and Hensley Henson as a clash between Gore, a "High Churchman with a deep concern for the inherent authority of the episcopal office" and Henson who believed that clergy were "...governed by the Law and only by the Bishops within the limits which the Law prescribes...[118]."

The re-negotiation of the law-making functions of Church and State was not happening in a political vacuum. An important strand in these processes was that the democratization of society was driving the Church to protect itself from indifference or

[115] Thompson (1970).

[116] Wilkinson (1978).

[117] Randall Thomas Davidson, *The Five Lambeth* Conferences, 1920. Herbert Hensley Henson, *Retrospect of an Unimportant Life*. 3 Volumes, 1942-50. F. A. Iremonger, *William Temple, Archbishop of Canterbury, His Life and Letters*, 1948.

[118] Flindall (1972), p 298. Flindall gives the example of the 'Inhibition' order sent to Henson by Gore in a letter dated 26 March 1926 asking Henson not to preach in a Diocese of Birmingham where the vicar of the parish had protested as Henson had "no cure of soul" there. This order was defied by Henson. *Ibid*.

even worse, a secularizing parliament. But the Church did not in the main want Disestablishment. It therefore had to present its case in terms of parliamentary time and assure parliament that its inclusion of lay members in its own representative structures would ensure that the Church's law-making would remain representative of the wider social interest. The critical features of Establishment could then be assured by maintaining the parliamentary veto. But there were other more radical forces that also played a role in driving these changes. One of the driving forces for change was described by Thompson in his book, *Bureaucracy and Church Reform*, as the Life and Liberty Movement, which had campaigned for greater autonomy for the Church during the war[119]. Led by William Temple, this movement clearly set out its ambitious plans in their first public statement printed in *The Times* on 20th June 1917 which stated that

> "…Those who are promoting this movement are convinced that we must win for the Church full power to control its own life, even at the cost, if necessary, of disestablishment and of whatever consequences that may possibly involve…"

On the other hand, the need for change and the desire to break with historical traditions was not universally felt in the Church. There were detractors within, such as Herbert Hensley Henson who wrote in exasperation that:

> "The Church of England still retains the imposing façade of the Elizabethan Establishment which Hooker defended, but the façade is as delusive as it is picturesque. It belongs to a Past, which can never return: it has little hold on the Present and less hope for the Future. Its passing away, which cannot be long

[119] Thompson (1970), p. 156.

> postponed, may conceivably release spiritual energies which it can only hamper and conceal. The English Establishment is only one more example of mutability[120]".

This rather pessimistic outlook from Henson[121] reflected his strong opposition to any loosening of ties between Church and State and his realization that he had lost that battle[122]. The word "mutability" was very aptly used by Henson to describe this era. This was a period of great change in British society following the end of the First World War. It was against this backdrop of change that the Church of England Assembly (Powers) Act 1919 came into being.

The formal request to change the historical way in which Parliament had legislated for the Church was presented to Parliament in a document dated the 27th of May 1919[123]. This document contained the proposal by the Convocations of Canterbury and York to give the newly constituted Church Assembly the responsibility for formulating and preparing legislation for the Church. The document was careful to emphasise the continued role of Parliamentary involvement in the process. But it proposed a fine

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[120] Henson (1939), pp 40-41.

[121] Bishop of Durham from 1920-39.

[122] Henson changed his view on Establishment later in his life and became a strong advocate of breaking the link between Church and State.

[123] House of Commons Papers; Accounts and Papers, (102) XL11. 821. The title described this document as the "copy of the address presented to His Majesty by the convocations of Canterbury and York touching the constitution of the proposed National Assembly of the Church of England."

balancing act as the changes suggested would take away much of the historical authority Parliament had enjoyed to legislate for the Church since the break with Rome. See Appendix 1 of the thesis where the opening paragraphs from both Convocations have been reproduced. The Bill was presented by the Archbishop of Canterbury and had its first reading in the House of Lords on the 13th of May 1919[124].

3. 2 The Second Reading of the Bill

Presenting the Bill before the Lords for the second reading, the Archbishop began the debate by saying:

> I believe the work of the National Church to be of incalculable importance to the nation's life, and I ask you to help us to do it better than we at present can...the real gist and purport of this Bill...removing or diminishing, as we hope, hindrances which, by a kind of accident and not by anybody's fault, have been at present constantly across our way[125].

He went on to say that this Bill was not concerned with matters spiritual or doctrinal and was simply introducing changes to the "framework, the outer secular rules, within which our work has to be done" and making the point that "the Church of England framework has a distinctive and a peculiar relation to the State and to the national life" which brought with it advantage but also the "drawback of being old[126]". The

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[124] HL Deb 13 May 1919 vol 34 c 607.

[125] HL Deb 03 June 1919 vol 34 c 974.

Archbishop went on to say that the current procedure for processing Church Legislation through Parliament was part of the Post-Reformation constitutional settlement; which operated effectively in the past as Bishops had had a "larger proportionate voice" in a House of Lords which had fewer Members and the House of Commons did not just consist of representatives of lay English people, but also of the English Church. The differences in the social composition of parliament in the past had made "the whole legislative system in Church matters.. very much simpler and easier than it is to-day[127]".

The Archbishop then moved on to talk about the "amount of time which was un-grudgingly given to the Church and its affairs" in the past and gave examples of Ecclesiastical Bills which were processed by Parliament despite the complexity and volume of work involved. Moving to the present time, the Archbishop acknowledged the legislative pressures on Parliamentary time coming from different Government Departments and the Church of England had to compete with them for Parliamentary time and resources. The Archbishop then went on to clarify that,

> I am very far from thinking or regarding the Church of England as a branch of the Civil Service. I have heard this phrase used, and it is a most misleading one. Nevertheless the analogy holds good, because we are face to face to-day with abundant new problems, with all kinds of new activities, all kinds of aims and plans[128].

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[126] *Ibid.,* c 975.

[127] *Ibid.,* c 976.

The Archbishop then discussed other changes were of no lesser significance. Changes had taken place over the years in the composition of Parliament as a result of "the altered conditions of English public life", with an enlarged franchise, which had resulted in "far greater variety in Parliamentary representation". He went on to say that the nation had "gained enormously" by these changes "but one result was that many more were elected than ever before who were non-Churchmen[129]". This was an almost direct recognition of the concerns that we have alluded to earlier. It implied that these changes may have made Church issues less of a priority for such a House. Of course, there was an even more worrying possibility that in the future a secular parliament may not just be less interested in the Church, but may wish to legislate in a way that the Church may find unacceptable. But the Archbishop restricted his comments to the pragmatic concern with the lack of priority for the legislative needs of the Church of England in its future Parliamentary agenda:

> All the new questions of civil life—health, sanitation, housing, educational work, all the various things that are astir in what is called the social life of England to-day—are constantly before Parliament and rightly call for legislation, for wholesome legislation, and for the adaptation of old laws to the new facts[130].

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[128] *Ibid.*, c 979.

[129] HL Deb 03 June 1919 vol 34 c 978.

[130] *Ibid.*, c 979.

3. 3 The Proposals

The procedures for modern ecclesiastical law-making were established by the Church of England Assembly (Powers) Act 1919, which will be referred to as the Enabling Act in the remainder of this thesis. In the preamble to this Act, the role of Parliament was given very strong emphasis:

> "Whereas the Convocations of Canterbury and York have recommended that, *subject to the control and authority of His Majesty and of the two houses of Parliament,* powers in regard to legislation touching matters concerning the Church of England shall be conferred on the National Assembly of the Church of England..." (italics added)

This was a radical shift from the past. As pointed out by Anson, Church Legislation was no longer "the work of Parliament or any Government department, but of a wholly independent body, the National Assembly of the Church of England[131]". This was however not a divorce of Church and State, as Sir William Anson pointed out. Every religious society remained "in necessary subordination to Parliament, because Parliament may make the profession of its opinions unlawful, may subject the performance of its acts of worship to a penalty, may impose tests which disqualify its

[131] *Anson's Law and Custom of the Constitution, Vol 1* (1922), pp 319-321. This procedure was described by Anson, as an "interesting experiment" and a "constitutional novelty" and he concluded by saying that this method of law-making "...has perhaps in it the germs of further development, and is susceptible of being made applicable to other bodies than the Church of England".

members for office or franchise" and "every religious society, large or small, which enters into relations of property or contract, must necessarily be liable to have its doctrines discussed in a court of law[132]". This was no different from the sixteenth century position of Richard Hooker where he suggested that Parliament had the "competent authoritie" in Church affairs as without its legislative backing any rules made by the Church would not be considered as law.

The aim of the Enabling Act was twofold. Firstly, as far as possible every Measure had to have its contents decided by the Church, without the slightest taint of Erastianism[133] and secondly, that Parliament should have unfettered power to give or withhold consent to a Measure. This was a significant change in the role of Parliament vis-à-vis the Church which had until then been able to exercise effective control over ecclesiastic legislation following the emergence of a constitutional monarchy in 1689[134]. While parliament retained the power to veto a Measure, it was thought both by supporters and detractors of the Bill that this was unlikely unless the Measure touched upon very controversial issues.

By creating the Church Assembly, the Enabling Act set up the first self-governing administrative body of the Church of England. Prior to that, Convocations were

[132] Quoted in Henson (1939), p 47.

[133] The doctrine, that the state should have supremacy over the Church in ecclesiastical matters.

[134] As an example of this, *Halsbury's Laws of England (Ecclesiastic Laws)* (1955), p. 13 refers to Parliament creating new dioceses and regulated the clergy through the *Clergy Discipline Act* 1892.

responsible for the legislation of canons but needed the approval of the Monarch to become effective. The Church Assembly provided the foundation upon which the Church could hope to build an edifice which could be its own "Parliament" or "Legislative Assembly" for the Church of England. Even though the restrictions on who could vote for lay representatives to the Council were restrictive, these rules reflected the gender and economic bias of the times[135]. There is no doubt that the Enabling Act was a big step forward on the road to "setting the Church free". Some of the inadequacies in representation were only addressed through the creation of the General Synod five decades later.

3.4 Amendments in Parliament

The Bill went through significant changes during its passage through both Houses of Parliament and generated sophisticated and insightful debates. In the debate in the House of Lords it was clear from the very outset that the Archbishop was very keen to see the Bill going through unscathed. There were, however, strong opponents to the Bill in the form in which it was presented to the Lords for approval. During the second reading of the Bill in the House of Lords, Viscount Haldane proposed the motion:

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[135] Under the headship of the Bishop of Salisbury, a joint session of the Convocations of Canterbury and York set up the framework of the Representative Church Council in July 1903. The Council was to be composed of three Houses. The first House was to be composed of members from the Upper Houses of the Convocations of Canterbury and York. The Second House from the Lower Houses of the two Convocations and the Third House was to be composed of Lay Members of the two regions of Canterbury and York who were to be elected by. The electorate was limited to men "possessing such house-holding, or other vestry qualification in the parish or district" who had to declare in writing that they were members of the Church of England and no other religious communion. Flindall (1972), pp 286-287.

"That this House is unwilling, especially in the absence of independent inquiry, to assent to legislation which would exclude the greater part of the people of England from effective influence in the affairs of the National Church as established by the Constitution, and which is so framed as to enable members of that Church to pass laws that may wholly change its character without adequate supervision by Parliament[136]."

Viscount Haldane's[137] argument was that it was wrong to accept the Bill in the form in which it was presented, as it seemed to be an attempt by the Church to break away from

[136] HL Deb 03 June 1919 vol 34 c 993. Following a debate that spread over two days, this motion was defeated by 130 votes to 33.

[137] The rather long footnote below, gives a brief outline of Viscount Haldane's achievement and contribution to British politics. It seemed appropriate to add this to explain Haldane's political and legal background and the reasons why the proposed motion was given so much time to debate as it came from a man of great constitutional experience. H. C. G. Matthew, 'Haldane, Richard Burdon, Viscount Haldane (1856–1928)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Jan 2011.

A former Lord Chancellor who had had a distinguished political career first as a member of the Liberal Party (where he was a junior Minister) and later as a Minister under the first Labour Government. A respected intellectual (he translated the works of Scumpeter into English and worked with the Webbs to found the London School of Economics (1895) and to prepare the University of London Act (1898) and was involved in the establishment of Imperial College, London. The Taff Vale case, with Haldane appearing for the union, was an important case in the definition of the nature and obligations of associations. It reflected the sort of high-level legal work for which he had become known. During his time in the war Office, Haldane was credited with overseeing a modernized army without conscription. In 1912, he was appointed Lord Chancellor and returned to the position in 1924 (under a Labour administration) having been forced to resign the first time due to a whispering campaign which had wrongly accused him of being a German sympathiser. In dominion law, Haldane presided over the judicial committee of the privy council (JCPC) in every important appeal. It is with this kind of political and personal achievement behind him, that the intervention of Viscount Haldane in the 1919 Enabling Act debate was significant. His comments about the appropriateness of Privy Councillors to do the job

detailed Parliamentary scrutiny and input during the law-making process. This made him uneasy and he went on to say that:

> I have a strong dislike to putting my neck into a running noose and then handing the rope to somebody else. I would not mind handing it to the most Rev. Primate, because I am sure he would hold it in a kindly way, and I think I might trust the right Rev. Prelate the Bishop of London but I am not sure about that. I should feel a little nervous. But there have been Bishops to whom I would not have entrusted it[138].

From the perspective of the Selborne Committee report Viscount Haldane's criticisms of the Church of England were strongly countered by Lord Parmoor who was Chairman of the House of Laymen of the Province of Canterbury. He had been a member of the Selborne Committee on whose proposals the Bill was prepared and presented to Parliament. But Viscount Haldane questioned the constitutional basis of Section (2)[139]

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assigned to them by this Bill was the voice of experience in these matters as he had been a Privy Councillor since 1905. [http://www.oxforddnb.com/view/article/33643, accessed 1 Sept 2011]

[138] HL Deb 03 June 1919 vol 34 c 1008.

[139] 2. (1) There shall be a Committee of His Majesty's Privy Council styled "The Ecclesiastical Committee of the Privy Council." (2) The Ecclesiastical Committee shall consist of such 25 members of the Privy Council, not exceeding twenty-five in all, as His Majesty from time to time may think fit to appoint in that behalf, the tenure of the office to be for ten years. (3) The powers and duties of the Ecclesiastical Committee may be exercised and discharged by any twelve members thereof.

of the Bill which allowed an Ecclesiastical Committee composed of Privy Councillors to advise the Monarch on Church of England Measures:

> "...according to the maxim of our country, "the King can do no wrong," and the reason is that there is always a Minister responsible... He cannot do the smallest thing except on the advice of a Minister who is responsible to Parliament. That is the essence of democracy and of our Constitution. But this precious Ecclesiastical Committee of the Privy Council—twenty-five men—who are they, and how are they to be chosen? There is not a word in the Bill about it...is a doctrine which relies on the King acting on the advice of Ministers responsible to Parliament, but here he is to be called upon to act on the advice of Ministers who are not responsible to Parliament—responsible to whom we know not[140]...".

The other significant contributor to the debate in the House of Lords on the Enabling Act was Viscount Finlay[141], who like Viscount Haldane had a legal background and had

[140] HL Deb 03 June 1919 vol 34 c 1010.

[141] G. R. Rubin, 'Finlay, Robert Bannatyne, first Viscount Finlay (1842–1929)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, Sept 2010 [http://www.oxforddnb.com/view/article/33132, accessed 1 Sept 2011] Viscount Finlay (1842–1929). He was called to the bar in 1867 and became treasurer of Middle Temple in 1902. He entered Parliament in 1885. As a staunch supporter of the Church of Scotland, his first parliamentary initiative was to attempt unsuccessfully to broker a deal, prescribed in the Scottish Church Union Bill in March 1886, to preserve the church's established status against the threat of disestablishment which some feared that Gladstone was considering. When the issue rose of Irish home rule, Finlay was described by Gladstone as 'one of the keenest and most vehement adversaries', and regarded his arguments as 'Toryism of the worst type' (Gladstone, *Diaries*, 11.574, 23 June 1886). At the general election of 1886 Finlay returned as a Liberal Unionist. He was appointed to the position of solicitor-general and received a Knighthood in 1895. Finlay made the transition from Liberal to Conservative Party with relative ease. After a brief stint outside

similarly held high Legal Office in Government. But that is probably where any similarity between the two ended as they represented starkly different political views and beliefs[142].

Viscount Finlay's objections were to Clause (4)[143] of the Bill which

> "...provides for the case of the Ecclesiastical Committee...reporting on a measure presented by the Legislative Committee. That report and the text of the measure are to be laid before both Houses of Parliament. The clause goes on— If the Ecclesiastical Committee shall have advised His Majesty to give his Royal Assent to the measure, then, unless within forty days either House, of Parliament shall direct to the contrary, such measure shall be presented to His Majesty' and

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Parliament, Viscount Finlay returned in 1910. At the age of 74, Finlay was appointed Lord Chancellor by Lloyd George in 1916. In 1920 Finlay became a member of the Permanent Court of Arbitration and in 1921 one of the first judges, and the only English-speaking one, of the Permanent Court of International Justice at The Hague.

[142] *Ibid.* In 1912, Viscount Finlay represented the White Star Line at the Board of Trade inquiry into the loss of the *Titanic.* His defence in the House of Lords of General Dyer following the Amritsar massacre in 1919 was seen as pivotal in getting support for the General's actions in the Lords. In 1924, Viscount Finlay was highly critical of Marie Stopes books advocating birth control in a libel action.

[143] 4. When the Ecclesiastical Committee shall have reported to His Majesty on any measure submitted by the Legislative Committee, the report, together with the text of such measure, shall be laid before both Houses of Parliament forthwith, if Parliament be sitting; if not, then immediately after the next meeting of Parliament, and thereupon, on an Address from each House of Parliament asking that such measure should be presented to His Majesty, such Measure shall be presented to His Majesty, and shall have the force and effect of an Act of Parliament on the Royal Assent being signified thereto in the same manner as to Acts of Parliament.

> shall have the force and effect of an Act of Parliament on the Royal Assent being signified thereto. It seems important to observe, as that clause stands, that a measure which had been recommended by the Legislative Committee might become law simply because Parliament in the press of other business had not been able to give the time necessary to pass an Address upon the subject. I cannot think that satisfactory. I do not think that is an adequate maintenance of the control of Parliament, and I would suggest very respectfully to those who have been most interested in this Bill that the measure should be amended by providing that the actual assent of both Houses of Parliament (is required)...[144]".

The Amendment was moved by Viscount Finlay in the second session in the Lords on the 10th of July 1919, to change the procedure by which Measures were to become Law following the advice and subsequent declaration by the Privy Council that the Measure was expedient. Viscount Finlay asserted that:

> The object of this Amendment is to ensure that no measure reported by the Ecclesiastical Committee shall go forward and become law unless with the express sanction of both Houses of Parliament...[145].

A former Lord Chancellor and expert on Constitutional Law, Viscount Finlay's reasons for making this amendment were in keeping with the acceptance earlier in the House that the Privy Council was not "giving advice" to the Sovereign on whether to give Royal Consent to a Measure. Rather the Privy Council was only reporting "on the

[144] HL Deb 01 July 1919 vol 35 c18.

[145] HL Deb 10 July 1919 vol 35 cc 470-471.

provisions of the measure and… reasons for thinking it expedient or not expedient[146]". If that was now the accepted role of the Privy Council, Viscount Finlay suggested that for a Measure to take effect as Law:

> "...both Houses of Parliament must present Addresses to His Majesty asking that that should be done. I think it will be generally recognised that this ensures complete control for both Houses of Parliament, and I trust that with this safeguard the Bill may be regarded as generally acceptable".

This Amendment was accepted without "great enthusiasm" by the Archbishop of Canterbury as it was clearly changing the original proposal of the Bill[147]:

> I want to make it perfectly clear that in no sense whatever do we desire to get things through Parliament in some private or unrecognised manner or that they should slip through because there is no time to oppose them[148].

The concern about a Committee of Privy Councillors looking at Church Legislation and advising the Monarch was itself questioned by Viscount Haldane[149]. During the debate,

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[146] *Ibid.*, c 471.

[147] According to the Archbishop, by accepting this Amendment, they were making"...a very marked step in the direction of conceding what we understand to be the public wish because we think it is not unreasonable, though it does change materially what we had proposed..."

[148] *Ibid.*, c 471-472. In his book *Cut the Connection*, Buchanan suggests that Archbishop Davidson was wrong to have capitulated to these demands to amend the original Bill but goes on to accept that the initial 'inertia' tabling Clause as he describes it, would still have left Parliament with control over Church Bills. The only advantage of the original Clause, according to Buchanan was that "...controversy would have been flagged up at an earlier point, and 'ambushes' would have been avoided...". Buchanan (1994), p 123.

Viscount Haldane pointed out that many in the House had "strong feelings against that" and suggested an alternative source of advice to the Monarch was the Secretary of State who could be nominated to carry out the responsibility of scrutiny[150]. Following which there was a warning from the Marquess of Salisbury warning members of the House who had concerns with the draft not to distort the Bill with amendments which would undermine the central aim of the legislation and make it pointless to proceed further and send it to the House of Commons. Essentially this was a veiled threat to those members unhappy with the Bill that the "promoters" of the Bill, may no longer go ahead with this process if the form of the Bill was changed dramatically[151].

In response to this, Viscount Haldane clarified his reasons for objecting to the Privy Council, by saying that he was very aware of the reason for this legislation, which was to allow the "Church to get its domestic legislation through Parliament quickly". He went on to say that he had "profound repugnance" with the proposal of the Privy Council advising the Sovereign instead of Ministers on Church legislation[152]. This he

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[149] The Bill was debated in the House of Lords before making its way to the House of Commons. Although this amendment was lost in the Lords. It was accepted in the House of Commons. The arguments of Viscount Haldane not having been a wasted effort.

[150] HL Deb 10 July 1919 vol 35 c 427

[151] *Ibid.*, c 429.

[152] Viscount Haldane's amendment to remove Clause (2) The Ecclesiastical Committee shall consist of such members of the Privy Council, not exceeding twenty-live in all, as His Majesty from time to time may think fit to appoint in that behalf; was defeated by 78 to 17 votes. HL Deb 10 July 1919 vol 35 c 428.

said was “totally unknown to the Constitution and inconsistent with its principles”. The idea that,

> The Sovereign of this country can do no wrong; as Blackstone even puts it, he is not supposed ever to think wrongly; and to make that good he has been provided with a body of advisers who are responsible to Parliament for everything he does[153].

At times the debate was like a Mexican standoff as the Archbishop tried to hold together the original framework of the Bill and not to capitulate to the amendments demanded by Members of the House[154]. Apart from the two serious objections from Viscounts Haldane and Finlay, there were also objections in the Lords over the way in which the Constitution of the new Church Assembly was an appendix to the Enabling Act Bill and therefore not in the Schedule of the Bill and could not

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[153] *Ibid.*, cc 430-431.

[154] Not a lot has been written about the process through which this Bill eventually made it to the Statute Books. Reading the Hansard debates and looking at the arguments for and against Amendments, is a good indication on how any future debate on disestablishing the Church of England may proceed in the Houses of Parliament. It may well be that a modern day Viscount Haldane and Viscount Finlay who will bring to bear the constitutional implications of changing the relationship of Church and State in such a future debate. Just as was the case with the 1919 Enabling Act, where theological and philosophical arguments were secondary to the Constitutional concerns which eventually led to significant amendments to the original Bill in both Houses of Parliament. Any future changes to Establishment or how laws are made for the Church of England should first be considered as a Constitutional issue rather than any a Human Rights/Equality/Religious issue.

> "...be amended, and...the approval of Parliament to it can only be a general approval without any opportunity of looking into details. When bodies come to Parliament to ask for self-government and to ask for power to regulate their own affairs it is the invariable practice to submit to Parliament the mode of constituting the body which is to be taken to represent them. We may take for examples of statutory powers things like the General Medical Council, and we may take many other bodies. Very often these powers and this constitution are prepared by a Royal Commission or an inquiry, and are submitted to one of the Departments of State after considerable examination. But the constitution of the body which is to exercise these powers is submitted to Parliament and Parliament has the right to say, and is entitled to say before it gives these powers of self-government...[155]."

The reason for such an arrangement was defended by the Earl as Selborne as necessary, on the grounds of practicality, suggesting that if

> "...the scheme is put into the Bill as a schedule you would have a Bill of enormous length, which would not have the slightest chance of getting through the House of Commons... is it not reasonable that the Church itself should say how that body is to be composed? Would it not be a mere mockery to pretend to

[155] Earl Russel. HL Deb 01 July 1919 vol 35 cc 74-75

> give the Church such a body and then form it in a way unacceptable to the Church[156]...".

The final amendment to the Bill in the Lords was accepted without a vote. It was proposed by Viscount Finlay and referred to Clause 3 of the Bill which stated that:

> (3) After considering the measure, the Ecclesiastical Committee shall draft a report thereon to His Majesty, advising that the Royal Assent ought or ought not to be given to it, and stating the reasons for such advice.

Viscount Finlay proposed an amendment to leave out the text from "Majesty" to the end of subsection (3) and to insert instead the following text: "stating the nature and legal effect of the measure and their views as to its expediency especially with relation to the constitutional rights of all His Majesty's subjects[157]."

The House of Lords then approved the Bill by 130 votes to 33 and its move to the next stage of its journey in the House of Commons. The Archbishop of York made a conciliatory speech indicating the willingness of the Church to work with Parliament to make this new Constitutional arrangement work. In his speech, the Archbishop said,

> "...so far as the Archbishops and Bishops are concerned, we are largely in the hands of those who have fuller experience of Parliamentary procedure. Certainly our desire is to make the ultimate assent of Parliament not in any way a form but a reality. And here again, if any amendment can be introduced which will more effectively stamp upon the Bill itself the honest and sincere desire of those who

[156] HL Deb 02 July 1919 vol 35 c117.

[157] HL Deb 10 July 1919 vol 35 c 466.

> promote it that Parliament shall have a full and effective discussion, and therefore a full and effective voice, in deciding whether or not the measure should pass, we are most anxious in every way that that should be done...[158]".

During the second reading in the House of Commons of the Enabling Act Bill, the intervention by Sir Ryland Adkins had a significant impact on the Bill. In his contribution to the debate, Sir Adkins pointed out that:

> Every Member of this House has a most profound respect for the Privy Council. It consists, as we know, of great statesmen and men who have received that most coveted of honours in consideration of their public services. But the Privy Council is not the House of Commons, and I submit to this House of Commons that this ought not to be a Committee of the Privy Council. If at all, it should be a Joint Committee of both Houses[159].

Adkins argument was that this change would make the Bill more palatable for members who were unhappy with these changes. Describing himself and fellow Parliamentarians as the "trustees of the constitutional rights of all people", Adkins suggested that this was a responsibility they had to exercise with care when voting in this instance as they were debating "a Bill unique in character, unique in method, unique in purpose[160]".

[158] HL Deb 02 July 1919 vol 35 c 147.

[159] HC Deb 07 November 1919 vol 120 cc1861-1862.

[160] HC Deb 07 Nov 1919 vol 120 cc 1858-1859

He then went on to imply, without actually saying it that such a proposed Joint Parliamentary Committee would not be a 'political' body, pointing out that:

> I do not, of course, mean the ordinary Joint Committee of three or four peers and an equal number of Members of this House, such as is appointed to decide...the extension of the gas system...I mean a Joint Committee analogous to that appointed by Mr. Speaker on Electoral Reform, in which all points of view are represented, including men of Cabinet rank and ordinary Members of this House, and of the other House. A Committee of that kind of Parliamentary representatives, impartial in character, representing the different points of view of the different great interests, would be a far better body than a Committee of the Privy Council devoid of a Parliamentary character, and very likely unable in it to include representatives of the great religious communities of the country in an adequate proportion[161].

This proposal of Adkins was accepted in the Committee stage and incorporated in the amended Bill. It is difficult to know how much of an impact Viscount Haldane's attempts in the House of Lords to remove the position of Privy Council from being advisors to the Monarch on Church of England Measures played a role in influencing the way in which this Clause got amended at the Committee Stage.

[161] HC Deb 07 November 1919 vol 120 c1862.

Adkins was unable to get the Bill to be discussed by a Committee of the whole House after a vote was taken in the House of Commons in which his proposal was defeated by 250 votes to only 8 in favour and the Bill was moved upstairs to Select Committee E[162].

Adkins was also unable to influence any change on another aspect of the Bill which was:

> "...the right of this House and their Lordships House to amend as well as to affirm or reject. I know of no precedent—there are certainly none in legislation of the first quality and importance—for the Houses of Parliament to be unable to amend anything proposed to it. It really is difficult to express in language, which is in accordance with the friendly attitude I am trying to take, one's alarm and dislike of—and resolve, if possible, to destroy it—this outrageous and intolerable suggestion that neither House of Parliament is to have the power to amend proposals which are put before it. This is to withdraw from Parliament its most important power. It is comparatively easy to reject something; it is equally easy to accept something, if you hate the one and love the other. But who is there with any experience of legislation who does not know that even in a Bill of which he most approves he may consider it would be bettered in detail, or made less objectionable in a Bill he dislikes? Therefore, I hope this House will see that that part of the Bill is altered...[163]"

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[162] HC Deb 07 November 1919 vol 120 c 1896.

[163] *Ibid.*, c 1862-1863.

Despite the attempts of Adkins, this part of the Bill was not altered and has stayed on the Statute Books to haunt future generations of Parliamentarians. The Bill returned to the House of Commons with the amended Clause 2 which now read:

> (2) The Ecclesiastical Committee shall consist of fifteen members of the House of Lords, nominated by the Lord Chief Justice, and fifteen members of the House of Commons, nominated by the Speaker of the House of Commons, to be appointed at the commencement of each Parliament and to serve for the duration of that Parliament.

One further amendment was made at this stage by Viscount Wolmer to Clause 2 where the words "Lord Chief Justice" were to be removed and the words "Lord Chancellor" inserted[164]. The reason given by Viscount Wolmer to the Speaker of the House of Commons for this last minute change was that,

> "...the office of Lord Chancellor is the office of a Cabinet Minister...that the Lord Chancellor, besides being Lord Chancellor, is also Speaker of the House of Lords, and, therefore, if the Members of the House of Commons on the Ecclesiastical Committee were to be appointed by you, Sir—and I am sure we all hope they will be—it is only fitting and right that the Members of the House of Lords should be appointed by the Lord Chancellor...[165]".

At the end of what may have seemed like a very long road for the leaders of the Church of England, the Enabling Act was passed by the House of Commons on the 5th of

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[164] HC Deb 05 December 1919 vol 122 c 839.

[165] HC Deb 05 December 1919 vol 122 c 840.

December 1919 and the changes made in the House of Commons, following the Committee Stage, were approved by the House of Lords on the 15th of December 1919.

3.5 The significance of the 1919 Enabling Act

The significance of the Enabling Act was that it introduced a change in the historical Ecclesiastical legislative process which had remained unchanged since the Reformation. Henson quoted the Earl of Selborne in his book with approval who stated that the essence of Establishment was the "part played by Parliament in Ecclesiastical legislation–the restrictions placed by the State upon the enactment of Church laws–and the authority of the Ecclesiastical Courts[166]". The Enabling Act changed that definition of Establishment.

The need for this change (as presented by the supporters of the 1919 Act) was that it was a practical step to ensure Church legislation got to the statute books. To strengthen the case for this Bill and probably to influence those Parliamentarians who did not have an entrenched position on this issue, Viscount Wolmer presented his paper, *The Failure of the House of Commons in Ecclesiastical Legislation*[167] in 1919. Illustrating the practicalities of why such a Bill was necessary, Viscount Wolmer listed the number of Church Bills which were dropped due to lack of time or because Parliament was no longer interested in Church matters. According to the figures presented in the paper,

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[166] Selborne (1886), pp 68-69.

[167] Church Self-Government Papers, No. 10, 1919

since 1880, 21 out of 22 Bills to end the sale of livings had to be dropped, 30 out of 40 Bills to create new bishoprics, suffragan bishoprics and archdeacons had to be dropped and only one out of 32 Bills to discuss matters concerned with ritual were debated[168]. These figures clearly portrayed a sorry picture of the practicalities of having Parliament legislating for the Church.

Legislative gridlock for Church Bills in the 20th century was described by Cyril Garbett as shambolic. Churchgoers who had collected large sums of money for new dioceses often found that the Bill authorising their creation was blocked year after year by a small group of members of Parliament[169]. This point was forcefully made by Sir Edward Beauchamp when introducing the 1919 Enabling Act to the House of Commons for discussion[170]. In his opening remarks, Sir Beauchamp stated that Church Bills were often "...opposed—by opposed I mean obstructed...[171]" and went on to ask what was

> "...the record of recent years? Examination of the Public Bill Lists from 1880 to 1913 reveals this. Two hundred and seventeen Church Bills were introduced into

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[168] Referred to in Thompson (1970), p 158.

[169] Garbett (1947), p 192.

[170] HC Deb 07 Nov 1919 vol 120. Sir Edward Beauchamp (1849-1925), s.o. Revd William Beauchamp, Rector of Chedgrave, Norfolk, M.P. for Lowestoft 1906-1910 and 1910-22, Chairman of Lloyds 1905 and 1913. Created baronet 1911.

[171] Certain members took this as criticism of, Free Church and Nonconformist members. *Ibid.*, cc 1824-1837.

> this House; 183 of these were never heard of again. One was negatived and thirty-three were passed. Of those thirty-three, thirteen were sponsored by the responsible Minister of the Government of the day...[172]".

These arguments did not have universal support in the Church or in Parliament as was evident during the debate in Parliament where certain Members saw the Bill as "...an absolute destruction of the rights of Parliament...an intolerable infraction of the rights and responsibilities of Parliament...[173]". Similar points were made by other members who felt this was an unnecessary abdication by Parliament of its historical role in legislating for the Church. The opposition of these members in Parliament was not seen as sufficiently significant or robust by Henson who described the process by which the Enabling Act came into being as reflecting "the indifference of the nation" where,

> "... no Act of equal importance was so little demanded by the country, so little understood by the Church, and so little debated in Parliament. The measure of the Church's decline in social and political importance...was suddenly revealed when Parliament surrendered without reluctance its control of ecclesiastical legislation, and sanctioned without discussion a new constitution for the National Church...[174]".

[172] HC Deb 07 November 1919 vol 120 c 1819

[173] Mr G Thorne, *Ibid.*, c 1845

[174] Henson (1939), pp 222-223.

It is difficult to speculate on what would have been the outcome for Church and State relations if the Enabling Act had not been passed. What is definite looking at the facts and figures presented above by Viscount Wolmer is that the status quo that existed prior to 1919 could not have continued for long. Looking ahead from 1919 at the political changes and events that took place in England in the decades from the 1920s to the 1950s. It was a time of great flux and change. The country faced another traumatic war from 1939 and 1945 where the world order changed dramatically and new players came to the forefront of world politics like the newly constituted Soviet Union. The Labour Party which won a stunning victory following the end of the Second World War came to office with a packed legislative agenda.

If the 1919 Act had not been passed by then, it is very likely that in this wave of legislative changes, the Labour Party may have disestablished the Church of England or constructed a mechanism by which Ecclesiastical Law followed the same legislative process as Canon Law and not required the sanction of Parliament in any way. The historical difference between the legal remit of a Canon Law and that of Ecclesiastical Law would have remained, even if they had both been formulated in the same way.

It is worth noting that the Labour Party and its membership of the 40s and 50s were not necessarily the natural allies of the Church of England.[175] The legislative process for making Ecclesiastical Laws would in all probability have undergone a change had Parliament rejected the 1919 Act. However what the nature of that change may have been is beyond the remit of this thesis.

[175] Morgan Phillips, the Welsh colliery worker who served as Labour's Secretary-General between 1944 and 1961, declared that his party owed more to Methodism than to Marxism.

PART II THE LEGISLATIVE PROCESS

CHAPTER 4. THE ECCLESIASTICAL SETTLEMENT

This part of the thesis begins by looking the definition of two important terms in State-Church relations. The first is "Establishment"; the other is "Ecclesiastical Law". This is followed by an analysis of the legislative process of Ecclesiastical lawmaking and the role of the Ecclesiastical Committee in this process. Finally, this section has a case study chapter which looks at four Measures that came before the Ecclesiastical Committee.

4.1 Anomalies in the Definition of Establishment

Like much of the rest of the British Constitution, what constitutes the *Establishment* has to be read off from an evolving and diverse bundle of legislation and conventions. The first authoritative mention of the term *Established* appears not in the *Act of Supremacy* but rather in the 1603 Code, Canon 3, which states that the Church of England is "established according to the laws of this realm under the King's Majesty..." [176]. Nowhere is the term 'Established' or 'Establishment' precisely defined. Nowhere is the Church of England's right to exist, as opposed to its mode of operation, enshrined in

[176] Vaisey, (1947).

legislation[177]. Nor is the precise meaning and limits of the constitutional implications of establishment defined in a single place.

Moreover, as with the rest of the British Constitution, the meaning of 'Establishment' has evolved over time. A most important anomaly is that while the Monarch and Parliament are clearly key actors in the British Constitution as a whole, their relationship with the Church as defined by Establishment refers only to the Church of England in England[178]. The anomalous treatment of England within the United Kingdom raises issues which are related to the constitutional implications of devolution on the one hand, and European integration on the other which is not further discussed in this dissertation.

These complexities are typically skirted over in standard constitutional approaches to the definition of Establishment. Wade and Phillips for instance describe Establishment

[177]De-la-Noy, M. (1993), p 33.

[178] As part of the Settlement of the Union with England in 1706, the Church of Scotland was given special recognition as the national church of Scotland and granted spiritual sovereignty. The Church of Scotland Act 1921 exempted the legislative acts of its General Assembly from requiring parliamentary approval or Royal Assent. In a recent debate in the House of Lords on the incorporation of the European Convention of Human Rights, Lord Mackay of Drumadoon rejected the suggestion that the Scottish Settlement had made the Church of Scotland an established church (H.L. Deb. 19 Jan. 1997, Col. 1272-1274). The Anglican Church in Ireland was disestablished by the Irish Church Act 1869 and the Church of England in Wales by the Welsh Church Act 1914.

in terms of the Church of England having "peculiar privileges which involve a close relationship with the State"[179]. The Chadwick Report of 1970 definition of

> The words "by law established" were originally used to denote the statutory process by which the allegiance of the Church of England to the Sovereign (and not to the Pope) and the forms of worship and doctrines of that Church were imposed by law. The phrase distinguished the legality of the national Church from other Churches which were then unlawful and whose worship and doctrines were then proscribed…For us 'establishment' means the laws that apply to the Church of England and not to other Churches[180].

Habgood describes establishment as an "official and more or less well-defined relationship between church and state"[181].In *Moore's Introduction to English Canon Law* the problem of finding a "definition" for Establishment is acknowledged. The authors accept that,

> "…Establishment may be easy to recognize, it is difficult to describe and more difficult still to define…"

They go on to point out that it is only with "…the Established Church that the officials of the Church are officials of the State; that the governmental organs of the Church are governmental organs of the State; and that the Church's judges are as much the Queen's

[179] Wade and Phillips (1931), p 383.

[180] *Report of the Archbishop's Commission* (1970), pp 1- 2.

[181] Habgood, J. (1983), p 94.

judges as are the secular judges, with their decrees enforced by the machinery of the State…[182]".

M. H. Ogilvie looks at the definition of "by Law Established" in the English context in her article in the *Osgoode Hall Law Journal.*[183] She quotes Richard Davies definition

> The establishment is the relationship between the Church of England and the state by which the former takes on the character of a national Church and the latter the role of its supreme governor. The legal incidents consist broadly of control exercised by the state by virtue of its integral place in the Church's constitution, and rights and privileges received by the Church[184].

After looking at the way in the Church of England describes establishment in the Chadwick Report (see above) and in the 1966 Report on Anglican-Presbyterian Conversations,[185] Ogilvie submits that there are two correlative propositions concerning the essential nature of "establishment" in England which emerge from these definitions,

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[182] Briden and Hanson (1992), p 11

[183] Ogilvie (1990), pp 179-226. The background to her article was a decision by the Canadian Supreme Court on the status of the single church in Ontario which enjoyed exclusive State support and protection and whether such a relationship was tantamount to legal establishment of that particular church.

[184] "Church and State" (1976) 7 The Cambrian Law Review 10 at 10-11. Quoted in Ogilvie (1990), p 197.

[185] "The Fundamental essence of "establishment" consists simply in the recognition by the State of some particular religious body as the "State Church" that is, as the body to which the State looks to act for it in matters of religion, and which it expects to consecrate great moments of national life by liturgical or official ministrations." Ogilvie (1990), p 198.

> First, an established church is that single church within a country accepted and recognized by the state as the truest expression of the Christian faith. Secondly, the state's recognition of its established church places upon that state a legal duty to protect, preserve and defend that church, if necessary to the exclusion of all others[186].

These definitions of "Establishment" leave us with the difficult task of identifying and selecting the laws defining establishment. A precise definition of establishment was offered by Justice Hugo Black in the United States when he clarified *what* the First Amendment of the United States Bill of Rights actually proscribed in banning the *establishment of religion*[187]. He explained that the First Amendment meant that,

> "(n)either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another.....No tax in any amount, large or small, can be levied to support any religious activities or institutions....to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State[188]".

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[186] Ogilvie (1990), p 198.

[187] The First Amendment of the US Constitution says "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..".

[188] Knight, H. V. (1968), p 104.

Clearly a very wide range of laws in Britain may be involved in the "establishment of religion" according to Justice Black's definition. These would include not just the laws governing the relationship between church and state but also legislation governing the funding of religious schools, religious assemblies in schools and so on. We therefore have to exercise judgement in identifying and selecting the legislation and conventions that are of greatest constitutional significance. In our subsequent sections we will limit ourselves to the laws and conventions governing the relationship between Crown, Parliament and the Church of England as the *basis* of the Establishment in Britain.

4.2 Definition of Ecclesiastical Law

The process established by the Enabling Act was for legislation, which was deemed to be "Ecclesiastical Law". There remained in place the historical procedure of legislating by Canons, for which the Convocations did not have to go through Parliament but could get direct approval by the Crown. There are different routes for approval for Canons and Measures, which become law after its approval. As the processes relevant for Canons and Measures are so different, one has to have a clear understanding of what qualifies as "Ecclesiastical Law". This is not as easy as it may sound as the distinctions between what is a Canon and what is Ecclesiastical Law are often blurred.

According to Doe,

> "…Definitions have been constructed around a variety of criteria, including subject-matter, sources, the institutions which create,

> administer, or enforce cannon or ecclesiastical law, and ecclesiological propositions about the purpose for which the church exists. The absence of agreed criteria has resulted in a plethora of divergent definitions…[189]".

In the view of Doe, ecclesiastical law is "law created for the church by God and by the church[190]". Although there is a distinction in the way that canon law and ecclesiastical law is promulgated, often the distinction between the two is blurred in some definitions such as that by Garth Moore who described "canon law" as encompassing "…the law of England as is concerned with the regulation of the affairs of the Church of England…"[191]. Making a distinction between canon and ecclesiastical law is further complicated by the fact that their sources may be similar. According to Briden and Hanson, apart from divine law, the origins of 'canon law' could be church-made or state-made[192]. The second definition offered by Doe for ecclesiastical law is "…law created by the state for the church…"[193] However, as the Church of England is an established Church, canonists such as Thomas Watkins point out that "…ecclesiastical law made by the State…encompasses the canon law as well…"[194]. There is moreover a

[189] Doe (1996), p 12

[190] *Ibid.*, p 13.

[191] Quoted in Doe (1996), p 13.

[192] Briden and Hanson (1992), pp 2-8.

[193] *Ibid.*, p 14.

[194] Watkins (1990), p 111.

view expressed by some writers such as Georg May who make the distinction that where a church is established, the laws of the state, which regulate church affairs, are "…civil and not ecclesiastical law…"[195].

There is another, more narrow definition of ecclesiastical law which, in the words of Doe, applies to the "… law of the Church of England to the exclusion of all other law applicable to other churches…[196]". In Halsbury, law relating to any matter concerning the Church of England can be "…administered and enforced in any court…[197]" (temporal or ecclesiastical). This split in jurisdiction does not undermine the unity of ecclesiastical law as pointed out by Uthwatt J in AG v Dean and Chapter of Ripon Cathedral[198]. In addition to this, there are statements of explanation made in courts such as that made by Lloyd LJ in the case of Kirkham v Chief Constable of Manchester where he stated that ecclesiastical law was "…part of the general law of England…[199]". This is also the interpretation adopted by Lord Blackburn in Mackonochie v Lord

[195] May in Rahner (ed.) (1981), 395.

[196] Doe (1996), p 14.

[197] (1975), para. 301.

[198] [1945] Ch 239 at 245.

[199] [1990] 2 QB 283 at 292.

Penzance where he stated that "…ecclesiastical law is not a foreign law. It is part of the general law of England – of the common law – in that wider sense…[200]".

According to Denning, in his article *The Meaning of 'Ecclesiastical Law* it was not necessary to define Ecclesiastical law as

> "...long as the Church of England remains established, there is no need to define 'Ecclesiastical Law' any more than there is any need to define constitutional law or any other branch of the law. It is all part of the law of the land, and the classification is merely for convenience of treatment...[201]

Doe disagrees with this idea and in his opinion

> "…the use in these definitions of a concept of actual judicial enforcement suggests that any rule of ecclesiastical (or canon) law not enforced ceases to enjoy the status of law: this is untenable, as any rule enjoying a formal mark of validity which is capable of enforcement by judicial or executive action possesses the quality of law; moreover, many legal arrangements are merely

[200] (1881) 6 App Cas 424 at 446. See Doe (1996), p. 15 (f. n. 53) for list of cases where this principle has been adopted.

[201] The meaning of 'ecclesiastical law' 60 *LQR* (1944), p. 235

facultative or descriptive by nature and the question of their enforcement does not ordinarily arise…"[202].

Finally, there is general law which is described by Doe as "…law created by the state which is applicable to a religious community in both its internal affairs and its relations with outside bodies…"[203]. In AG v Dean and Chapter of Ripon Cathedral this law was referred to as "…a body of law concerning the Church of England which does not form part of ecclesiastical law…[204]".

The simplest and best definition of Ecclesiastical Law is that put forward by Mark Hill, where he describe Ecclesiastical law as "law of the Church of England, however created[205]". This is the definition which can be applied to Ecclesiastical Law historically and will stand the test of time even if the process of Ecclesiastical lawmaking changes over time.

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[202] Doe (1996), p 15. In a footnote to the above comment, Doe suggests that this is a standard idea in civil jurisprudence and cites the article of C. Munro "Laws and conventions distinguished" LQR, 91 (1975), 218 as an example.

[203] Doe (1996), p 15.

[204] [1945] Ch 239 at 244-245.

[205] Hill (2001), pp 1-2.

4.3 The Ecclesiastical Committee

Legislation governing the Church of England is set out in the provisions of the Church of England (Assembly) Powers Act 1919, as amended by the Synodical Government Measure 1969. Measures are described in Erskine May as

> Legislative measures[206] touching matters concerning the Church of England, intended to receive the Royal Assent and to have effect as Acts of Parliament in accordance with the provisions of that Act[207]. They have express authority to amend or repeal Acts of Parliament, including the Act of 1919, with the exception of those provisions, which relate to the composition, powers or duties of the Ecclesiastical Committee...or the procedure in Parliament prescribed by section 4 of the Act[208].

The Ecclesiastical Committee consists of members of both Houses of Parliament and was set up under the 1919 Act. Unlike other joint committees, the Ecclesiastical Committee is a statutory body, which means that its proceedings are not proceedings in

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[206]Measures do not automatically apply to the Isle of Man, although an Act of Tynwald can extend it to the jurisdiction with or without modifications. The same applies to the Channel Islands where an extension may be made by the special procedures of the Channel Islands (Church Legislation) Measures 1931 and 1957. Erskine May (2004), p 702.

[207] The Human Rights Act 1998, S 10(6) excludes Church of England Measures from the definition of legislation which may be altered by the remedial order procedure, where it has been found to be incompatible with Convention rights by a United Kingdom Court or with the European Convention on Human Rights by the European Court of Human Rights.

[208] Erskine May (2004), pp 701-702.

Parliament. The Ecclesiastical Committee has the authority to regulate its own procedure but has decided to follow the procedure of joint committees by a resolution made on the 22nd of March 1921[209].

The Committee is appointed for the duration of the Parliament and consists of fifteen members of the House of Lords who are nominated by the Lord Speaker[210] and a similar number from the House of Commons who are nominated by the Speaker[211]. The Lord Speaker and the Speaker fill any casual vacancies over the term in the same way respectively[212]. The quorum of the Committee is twelve and as it is a statutory body it is able to convene even if Parliament is in recess. The Committee appoints its own Chairman who has always been a Member of the House of Lords and since 1947, always a Lord of Appeal. The Chairman in 2011 is Lord Lloyd of Berwick who was elected on the 3rd of November 2005.

Under the original Bill as it was presented to Parliament, the Ecclesiastical Committee was originally meant to be composed of Members drawn from the Privy Council. This

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[209] See S2 of 1919 Enabling Act. May (2004), p 702.

[210] Schedule 6 to the Constitutional Reform Act 2005 confers on the Lord Speaker the functions previously undertaken by the Lord Chancellor. The appointment to the Ecclesiastical Committee falls under miscellaneous statutory functions.

[211] See Minutes of Proceeding and Votes and Proceedings, 24th January 2002.

[212] See Minutes of Proceeding and Votes and Proceedings, 14th March 2002 and 9th December 2002.

was amended at the Committee Stage due to objections raised by Members in both Houses. We will examine these objections in more detail in the next sections.

The Ecclesiastical Committee is responsible for presenting to Parliament any Measure submitted to it by the Legislative Committee of the General Synod. In this endeavour, the Ecclesiastical Committee may be assisted by comments or explanations submitted to it by the Synod's Legislative Assembly. It is the responsibility of the members of the Committee to look at the nature and legal effect that the Measure may have. In particular, the Committee has to look at the expediency of such a Measure and the impact it may have on the "...constitutional rights of all Her Majesty's subjects..."[213].

A significant constraint imposed on the Committee by legislation is that it cannot amend any Measure put forward by the Legislative Assembly. Unlike members of Select Committees, members of the Ecclesiastical Committee are not allowed to call witnesses and any clarifications have to be obtained from members of the Synod and any disagreements resolved by calling a joint sitting with the Legislative Assembly of the General Synod (who are also allowed to call for such a session)[214]. The Committee has to get the approval from the Legislative Assembly before submitting any report to Parliament which accompanies the Measure and if directed by the Assembly has to

[213] May (2004), p 702.

[214] Example of Measures discussed this way was on the 5th of July 1993, the Priests (Ordination of Women) Measure and the Ordination of Women (Financial Provisions) Measures. See HL 116 and HC 895 (1992-93). Meetings with representatives of the Synod, or a conference are held in public and a transcript of the proceedings is published with the Committee Report. Other parts of the Committee's deliberations are held in private. May (2004), p 703.

withhold or even withdraw submitting the Measure if the Legislative Committee is not happy for it to go before Parliament. This is usually the case if the Ecclesiastical Committee's report is critical of the Measure.

The Ecclesiastical Committee has to let the Legislative Committee of the General Synod know its views about a proposed Measure, prior to submitting it for approval by the two Houses of Parliament. It is only after the Legislative Committee has looked at the draft report of the Ecclesiastical Committee and expressed its satisfaction that the proposed Measure be put before Parliament, can the process move forward. If at that point in time, Parliament is not sitting, it is presented for approval at the first opportunity possible. The Legislative Committee may at any time withdraw the Measure, before the proposal is presented to Parliament. This is a good safety mechanism for the Legislative Committee, especially if the report of the Ecclesiastical Committee is critical of the proposal. However, if the Committee is happy for the draft Measure to be submitted, than the Measure and the accompanying report is printed as parliamentary papers and submitted at the earliest opportunity to Parliament[215].

Once a Measure has been ordered to be printed, the motion can be laid before both Houses for their consideration. In essence, Royal Assent has to be given to the Measure as presented to both houses without any amendment made to either the motion or the Measures.

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[215] Erskine May (2004), p 704.

Apart from the fact that Measures are "Bills" drafted in one 'legislature' and voted upon by another, there are other anomalies in the way Measures are treated by Parliament.

> The Government always provides time for the discussion of Church of England Measures…provision is made in Standing Orders for them to be referred to Standing Committees and treated as if they were statutory instruments[216].

Although, it is allocated Government time, Measures do not follow the procedures of a Government Bill with a Minister presenting the Bill in the House and answering questions from Members. It is the responsibility of the Second Church Estates Commissioner to present a Measure for consideration in the Commons. When the Church of England (Worship and Doctrine) Measure[217] was introduced in the House of Commons, a point of order was raised by Mr. R. J. Maxwell-Hyslop who accused Mr. Terry Walker of reading his notes, which was against the Standing Orders of the House. At which point Enoch Powell interjected that the Second Church Estates Commissioner should be regarded as a Member of the Government in this debate and thereby entitled to the same conventions as if he was speaking from the Dispatch Box[218]. As the Speaker of the House did not dispute Powell's assertion, one presumes that this is accepted to be the case.

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[216] *Ibid.*, p 324.

[217] HC Deb 4 December 1974 cc 1567-1698.

Another unusual aspect of Measures is that the "...Queen's consent must be signified to Measures affecting the prerogative or interest of the Crown before the Question is proposed on motions for the presentation of such Measures to Her Majesty...[219]". In 1984, Enoch Powell questioned the implications of this for the constitutional status of Measures[220]. Prior to the debate starting on the Appointment of Bishops Measure, Enoch Powell raised a point of order. He had given notice of this and for this reason the Leader of the House of Commons was present to answer the query. Powell began by asserting that the Queen's consent, which was given on the advice of Ministers, could be taken for granted in legislation associated with the Government. There was however a difference vis-à-vis Measures related to the Church. He went on to say

> "...that this instrument is peculiar because it is, I take it, not a Government measure. Moreover, it emanates from an assembly in which, unlike this assembly, the Government enjoy neither a majority nor decisive influence. If the motion to be moved is passed by the House and the other place, the measure will be presented automatically for Royal Assent. In that sense, this is the last as well as the first opportunity that the House has for expressing an opinion on it and that the Government have of exercising any influence, which they wish to bring to bear. In those circumstances, Mr. Deputy Speaker, I submit that it might naturally

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[218] *Ibid*., c 1570.

[219] May (2004), p 704.

[220] HC Deb 16 July 1984 vol 64.

> be assumed from the Queen's consent being made available that the measure enjoys the Government's support and approval. If that is not the case, I submit to you, Mr. Deputy Speaker, and to the Leader of the House that the Government owe it to the House to make it clear, before the debate commences, whether that is the case...[221]".

Responding to this, the Lord Privy Seal and Leader of the House of Commons, Mr. John Biffen stated that

> "...I confirm my understanding that the signification by a Privy Councillor of the Queen's consent to a motion does not necessarily imply the Government's support for the measure...[222]".

This assertion had "...a note of ambiguity..." for Enoch Powell and he pressed the Leader of the House to confirm that "...this is not a measure to which the Government are a party or on which the Government, as a Government, have a view...". John Biffen then confirmed this, thereby confirming the ambiguity regarding responsibility.

[221] *Ibid.,* c 126.

[222] *Ibid*.

4.4 A Church of England Measure

This lack of Government accountability also brings with it other problems as pointed out by Sir Kenneth Pickthorn during the Church of England (Prayer Book)[223] 1965 debate in the Commons. During the debate, Sir Pickthorn suggested that

> These discussions are riddled through and through with paradoxes. The function and method is paradoxical. Part of the paradox is that we have nobody here in charge of the debate and there is in no sense a Minister present to answer our questions. We cannot ask for assurances or advice on administrative matters at all effectively[224].

This point was reiterated by Earl Waldegrave[225]in 1974 when he pointed out that members in the House were severely hampered in the amount of help and guidance they could give the Church vis-à-vis the Measure as they could not give the document "...the same treatment that we are accustomed to give to a Bill..."[226]. In the same passage he went on to illustrate the point that

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[223] HC Deb 23 February 1965 c 296.

[224] HC Deb 23 February 1965 cc 323-324 .

[225] HL Deb 14 November 1974 vol. 354 cc 867-945.

[226] *Ibid.*, c 881.

> There is no First, Second and Third Reading; there are no Committee and Report stages. Parliament is asked either, as to-day, to accept a Measure unamended, *in toto*, as it stands, after one debate, or to totally reject it. What help does Parliament have to come to its decision?
>
> Although there is no White Paper - let alone a Green Paper - Parliament has the advantage of the Report of the Ecclesiastical Committee, which I have here in my hand..., contains just this one sentence:
>
> > "In the opinion of the Committee the Measure is expedient."
>
> In the Report the Committee does not argue the case but it adds, as an annex, nine pages of comment and explanations which the General Synod (that is to say, the body promoting the Measure) has supplied to the Committee. We are not told in this Report whether anyone challenged the Measure; we are not told whether the Committee heard any other evidence or received any representations. My second suggestion, which I hope may be thought constructive, is that I believe that this procedure could perhaps be improved upon[227].

During the 1982 debate in the Commons to discuss the Pastoral (Amendment) Measure[228] Frank Field (who was a member of the Ecclesiastical Committee which had

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[227] *Ibid.*, cc 881-882

[228] HC Deb 17 June 1982 vol 25

debated the Measure) pointed out the weakness of the constitutional arrangement that had been set up by the 1919 and 1969 Acts to Legislate for the Church. He expressed his deep misgivings at the way this Measure was being rushed through the House and asked

> "...what will happen to this debate and the many hours which we spend in the ecclesiastical committee? How will the synod receive our comments? What is the mechanism by which it considers what the ecclesiastical committee says and what we say on the Floor of the House...[229]".

He went on to say that he hoped that after "...examining our comments, perhaps synod will consider that this part of the measure should not be enacted...[230]". He pointed out that the narrow vote in the Ecclesiastical Committee of 11 to 10 should be recognized by the synod as an indication that Members were unhappy with parts of this Measure. He asserted that

> The majority of 11 was made up of people who voted for the measure because of their responsibilities here or in synod or because they were non-conformists and believed, as a matter of principle, that the House, or

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[229] *Ibid.,* c 1194.

[230] *Ibid.,* c 1195.

> the ecclesiastical committee, should not interfere with Church business. Without that support, this aspect of the measure would not have been passed. This is an important message to take back[231].

According to Frank Field, he was "...unaware of the proper machinery to make our views known effectively to synod..." and it was for this reason that he was taking the opportunity to register his disquiet on the floor of the House. He went on to say

> "Our present procedures for accepting or rejecting are unsatisfactory…We do not wish to go down the path of disestablishment, but there are rights and duties for the established Church. The present set-up which some members of synod want all the privileges but have no wish to accept any of the reservations cannot and will not continue. My fear is not that this may be seen as a first step towards disestablishment, but the temper of this place is such that the Church may stumble into disestablishment without realizing what it is doing[232]".

Responding to the comments by Frank Field, William van Straubenzee pointed out that the possibility of the House amending a Measure went against "...the root of the settlement between Church and State, which was arrived at in 1919..."[233] He then went

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[231] *Ibid.*, c 1195.

[232] *Ibid.*, cc 1195-1196.

on to say the mechanism by which the synod was informed of the debates in the House was by the *Hansard* and other House journals. The reply by William van Straubenzee, particularly the latter comment, did appear as flippant to some parliamentarians despite claims that it was not meant to be.

There were deeply felt concerns among Parliamentarians about the way Parliament was perceived by the Church and in particular, by the General Synod. Lord Hawke summarized some of the tensions in Parliament over their inability to scrutinize Measures properly:

> ...many members of the Synod, both clergy and lay, have a pathological fear that Parliament is their enemy in some way and is likely to turn down at any time their request for liturgical change.
>
> They also feel that Parliament, which may have a non-Christian majority, is no place in which matters concerning a Christian denomination, a Christian Church, can be judged. Parliament does not have to be an expert in everything it is called upon to judge. It legislates upon agriculture, and how many of its Members have ever worked on a farm? It legislates on crime, and I do not know how many have experience of crime themselves...Parliament is a dispassionate judge; it makes up its mind as to whether there is a substantial body of opinion in the country

[233] *Ibid.*, c 1198.

> which has been overruled by the majority, and this it can only learn from its constituencies and from its postbag[234].

Clearly there is considerable evidence that Parliament is dissatisfied with aspects of the 1919 Act. The point made by Frank Field is discussed further in a subsequent case study chapter. The limitations on Parliament limiting it from amending a Measure can be very inefficient. The process of sending a Measure back to the General Synod, for it to reconsider part or all of the Measure is a waste of time for both Chambers. It took the Churchwarden Measure from 1998 to 2000 to get to the Statute Books due to this rigid system set up between the Synod and Parliament that did not allow compromises to be reached easily. At the same time, reforming procedures is likely to raise new questions.

4.5 Procedures followed in both Houses to pass a Measure

Church of England Measures are treated for procedural purposes like delegated legislation. Motions requesting that a Measure be passed in the form in which it has been laid before Parliament are traditionally moved by the Second Church Estate Commissioner, a private Member. However, Measures are debated in government time, motions relating to them are tabled on the remaining orders and do not need to be renewed each day, and debates on them are announced in a business statement235.

[234] HL Deb 14 November 1974 vol. 354 cc 888-889

According to the relevant Standing Order (No. 16), Measures concerning the Church of England which are to become an Act of Parliament are exempt from interruption at ten o'clock and proceedings can therefore continue until half-past eleven or for an hour and a half after their commencement whichever is later[236]. Essentially that means that under Standing Order 9 the discussion does not have to end at 10 o'clock. There is a provision which allows the Speaker to interrupt the debate and adjourn the discussion till the next sitting (apart from Friday) instead of putting the question to a vote if he feels the importance of the subject under debate is important enough for more time[237].

Where proceedings in relation to a Measure have not been completed in one session of Parliament, the Measure does not have to be presented again in the following session. In addition to that, the new Ecclesiastical Committee of a new Parliament is not required to consider again a Measure reported upon in the previous Parliament by the Committee[238]. One such example is the Church of England (Legal Aid and Miscellaneous Provisions) Measure 1987 which was laid and reported on in session

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[235] Erskine May (2004), p 329. Business Statement lists the order of Government business and the number of days it will be allocated and also sets out which days and half days have been allocated to Opposition business. This list is announced every Thursday. See Erskine May (2004), p. 318.

[236] Resolutions made under Church of England Assembly (Powers) Act 1919 are exempted business. Erskine May (2004), p 302

[237] Erskine May (2004), p 703.

[238] *Ibid.*

1986-87 and considered by both Houses in the new session of the 1987-88 Parliament[239].

In the few cases the Legislative Committee of the Synod are not happy for a Measure to go before the House, which is usually in cases where the report of the Ecclesiastical Committee report may not be favourable. In these cases, the proposal can be withdrawn. There have also been instances where it was indicated in the Ecclesiastical Committee report that they only had concerns with a part of the Measure and not all of it, as happened with the Clergy (Ordination and Miscellaneous Provisions) Measure 1964. In this case, the Measure was divided into two parts and the controversial part to which the Ecclesiastical Committee had expressed doubts was put into the Clergy (Ministration to Non-Resident Electors) Measures. This Measure was not progressed, thereby allowing the rest of the non- controversial part of the initial Measure to be approved by Parliament. It is the responsibility of the Speaker to ensure that a Measure is only submitted after the Legislative Committee of the General Synod formally gives its approval[240].

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[239] LJ (1986-87) 352; ibid (1987-88) 135 and CJ (1986-87) 359-360; ibid (1987-88) 272.

[240] See HC Deb (1967-68) 768, c 1676-1677: ibid 769, c 1000-1001: ibid (1968-69) 772, c 311: CJ (1967-68) 373, 378: ibid (1968-69) 9, 61 on Measures that were resubmitted after unfavourable reports by the Ecclesiastical Committee

There have been instances when Measures have only got approval from one House of Parliament and rejected by the other. This was the case with the Clergy (Ordination) Measure 1989 which was approved by the House of Lords but subsequently rejected by the Commons. This Measure was withdrawn and resubmitted in the next session of Parliament where it was approved by both Houses. In the case of the Appointment of Bishops Measure 1984, following its rejection by the House of Commons, the Measure was withdrawn from the Lords Order Papers and did not make the journey to the next House[241].

It is also possible for the two Houses to disagree about a Measure presented to it as happened in the Prayer Book revision Measure in 1926[242]. In some cases once one House has rejected a motion, it has been withdrawn prior to its submission to the next house as was the case with the Appointment of Bishops Measure 1984 on 16th July 1984[243] and the Clergy (Ordination) Measure. There have of course been cases when both Houses have rejected a proposed Measure as in the case of the Prayer Book Revision cases in 1927 and 1928[244].

[241] May (2004), p 704.

[242] See LJ (1926) 55 and CJ (1926) 49, 378.

[243] CJ 1983-84, 697.

[244] CJ (1927) 378, CJ (1928) 204.

A Measure can be divided into two or more Measures by the Lord Chairman of Committees and the Chairman of the Ways and Means Committee if they are of the opinion that a Measure deals with more than one subject[245]. In addition to this, in the same way that an Act can have statutory instruments linked to it, Measures related to the Church of England can also have similar provisions linked to it. In such cases, unless they fall under the Statutory Instruments Act of 1946, these provisions are not open to Parliamentary scrutiny. The view taken by the Ecclesiastical Committees in such cases have been set out in Erskine May[246] where it sets out how following a decision in 1930 by the Ecclesiastical Committee on issues related to sub-delegation, the Committee has consistently looked at sub-delegation provisions very carefully in an effort to ensure that they are restricted within the closest limits and the subject matter is clearly defined[247].

It is possible that a Measure may be set out in such a way that it allows parliamentary control over schemes or documents made under them as set out in the Second Special Report from the Commons Statutory Instruments Committee[248]. In addition to this a number of Measures provide that once the General Synod approves of a scheme or a document under a Measure, the statutory Instruments Act 1946 applies thereby treating

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[245] LJ (1963-64) 224; CJ (1963-64) 200

[246] May (2004), p 704.

[247] Ecclesiastical Committee: Minutes of Proceedings I, 379-382.

[248] May (2004) p 704. HC 7-v (1953-54).

the Measure as an Act and any resulting scheme or documentation as a statutory instrument. An example of this is the Faculty Jurisdiction Measure 1964 and the Clergy Pensions (Amendment) Measure 1972. There are cases such as the Ecclesiastical Fees Measure 1962 where certain schemes under it can amend private, local or personal Acts, but before they come into effect they have to be laid before Parliament by the Church Commissioner and only part of the Statutory Instruments Act is to apply to them.

The process by which legislation which concerns the Church of England (based on the Church of England Assembly (Powers) Act 1919) gets Royal assent is identical to the procedure followed in the case of public or private bills. Thereby giving the bill or Measure "the complement and perfection of a law[249]". In Erskine May's Treatise on *The Law, Privileges, Proceedings and Usage of Parliament*, the actual process of granting Royal Assent is set out as follows:

> When Royal Assent is wanted, the Lord Chancellor submits to the Sovereign a list of those bills which are ready for Royal Assent or which are likely to have been passed by the time Royal Assent is to be declared. The Clerk of the Parliaments prepares

[249] Mathew Hale, *Jurisdiction of the Lords' House of Parliament* (1796), c 2, quoted in May (2004), p 652

> the list[250]. An advance copy is sent to the Clerk of the Crown so that he may include those bills in the Letters Patent[251] by which the Sovereign is to signify the Royal Assent. Bills for granting aid and supplies to the Crown are placed first in the list, and are followed by public bills, provisional order bills, private bills and personal bills. Measures submitted for Royal Assent in pursuance of the provisions of the Church of England Assembly (Powers) Act 1919 are placed last[252]

Once a Measure gets the Royal Assent, it is printed after the date of the Royal Assent is inserted on the approved draft and the Measure is given a chapter number in accordance with the Acts of Parliament Numbering and Citation Act 1962. Prior to 1963, Acts were numbered serially by session and the regnal year or years of the session were printed on the top. Following the 1962 Act, the session, during which the bill was presented, is indicated by the number of the current Parliament and the session is indicated at the bottom-right hand corner of the title page, which is subsequently omitted in the Act copy. Measures related to the Church of England form a separate series and are numbered in Arabic characteristics.

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[250] There are some exceptions such as when Royal Assent is to be pronounced by commission or when it relates to issues concerning grants and aid to the Crown when the Clerk of the House of Commons keeps it. May (2004), p 652.

[251] The forms of Letters Patent to be used for signifying the Royal Assent are prescribed by rules made by Order in Council pursuant to the Crown Office Act 1887. These Letters Patent now have the wafer great seal embossed instead of the pendent wax seal. ibid.

[252] Erskine May (2004), p. 652.

Once the Measure has been approved, it follows a similar process as public Acts and the proof copy of the Measure is checked and certified by the Clerk of Public Bills in the House of Lords before being sent to the Queen's Printer. The actual publication of the Measure is the responsibility of the Controller of the Stationery Office. Two prints are prepared on durable vellum. One of these is sent for custody to the Public Records Office. The other, having being endorsed with the words by which the Royal Assent was signified, is signed by the Clerk of the Parliament and becomes the official copy of the Act and is lodged in the House of Lords Record Office[253]. Paper prints known as Queen's Printer copies are also printed and are placed on sale to the public and are recognized as evidence in courts of law.

[253] May (2004).

CHAPTER 5. THE CHURCH OF ENGLAND LEGISLATURE

This chapter provides a description of the legislative process within the Church of England. The Church does not have true legislative powers because its decisions do not have the full force of law. The Measure has to go through the parliamentary process and receive a Royal Assent before it can become law. Nevertheless, the detailed procedures of drafting and writing the actual Measures are the responsibility of the Church. The question which the Church of England will face if and when a time comes when Parliamentary scrutiny through the Ecclesiastical Committee is deemed "unnecessary" is whether the Church has the ability to transform the Church's legislative body into a credible "Parliament" for the Church of England. Till now the only legislation the Church has independent control over is Canon Law which only applies to the Church. The application of Ecclesiastical Law is wider and therefore the issue of legitimacy and credibility will arise if the process of lawmaking changes over time. The current scrutiny of the Ecclesiastical Committee and the sanction of Parliament give Ecclesiastical Law its constitutional legitimacy. Any proposed changes will have to take this into account and find an alternative system which can provide the same legitimacy.

5.1 An overview

Legislative power within the Church of England is concentrated at the highest level in the General Synod. One of the fundamentals of the church's constitutional order is the principle of synodical supremacy

"...General Synod may create for the church in the form of a *measure* any law it pleases and with the exception of the General Synod itself and the Queen in Parliament, no body, legislative, executive, or judicial, may legally deny a synodical measure its status as law…[254]."

If the future of Establishment is a parting of ways of Church and State, the question that needs to be addressed is whether the Church of England has its 'Parliament[255]' in place to claim total ownership of legislative procedures in the future. Can the Church of England claim to have a democratic and representative body in place which can be independent of scrutiny by another legislative body[256]? There already exists a system by which Canons are initiated in the Church body and sent directly for Royal Approval (on the advice of the Minister of Justice). A similar system could be replicated for Measures if Parliament were removed from the process. It is therefore technically possible for a transfer of legislative power and responsibility from Parliament to the General Synod though the extent to which these laws will continue to be externally enforceable by the state is a moot point.

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[254] Norman Doe. *The Legal Framework of the Church of England: A Critical Study in a Comparative Context*, (1996), p 56.

[255] 'The Parliament of the Church' was used by McCowan LJ in *R* v *Ecclesiastical Committee of Both Houses of Parliament, ex p the Church Society* (1993). Quoted in Doe (1996), p 56.

[256] Bogdanor has described the role played by Parliament in scrutinising Church Measures as "akin to the delaying power of the House of Lords". (1996), p 226.

As a first step, the Church of England has to ask to be free from the long shadow of Westminster on its doorstep. Since the Selborne Report in 1916 and almost every report since on Church and State matters published by the Church of England, the two common demands from the Church of England has been for freedom to appoint its own senior Clergy and freedom to decide on issues of worship and doctrine. The Church of England now enjoys both, following the 1974 Worship and Doctrine Measure and the decision by Gordon Brown to "remove" the right of the Prime Minister to choose one out of the two names for senior Church of England Clergy appointment.

Historically, the demand to remove the role of Parliament from the legislative process of the Church of England has not featured prominently in the list of grievances of the Church of England with the State. In the *Report of the Archbishops' Committee on Church and State* (London, SPCK, 1918), in the Chapter on "Proposals for the Reform of the Church Legislative Machinery", the report recommended,

> The remedy...to give to the church the right to legislate, and at the same time to provide a means by which *full powers of scrutiny, criticism and veto, are reserved to the State* (italics added)[257].

The *Report of the Archbishops' Commission 1970*, (Chadwick Report) did not address the wider implication of Parliament scrutinising Church of England legislation and focussed on the disquiet felt among its members of " the veto which Parliament exercises, or could exercise, over forms of worship[258]". If a future Archbishop

[257] *Report of the Archbishops' Committee on Church and State* (1918), p 39.

Committee were to demand an end to the 'Parliamentary veto' over Church of England Measures and possibly a total ending of Parliamentary scrutiny (currently performed by the Ecclesiastical Committee), the foundation for this claim would have to be that the General Synod was a more representative and suitable body to reflect the views not just of the Clergy (especially with the proposed changes to the number of Bishops in the House of Lords), but also and more significantly the lay members of the Church of England.

To see how credible such a claim could be, a good starting point would be to look at a similar Church representative body in United Kingdom which has been "given statutory recognition[259]", which is the Scottish General Assembly. Bogdanor does not think the General Synod of the Church of England and the Scottish General Assembly can be compared easily. In his book, *The Monarchy and the Constitution*, Bogdanor points to the much older tradition of the Scottish General Assembly (set up in the 16th Century), its wider representation and enhanced status (as compared to the English General Synod) as the "supreme authority" of the Church of Scotland. This is markedly different from the Church of England where the Supreme Governor is the supreme authority and not the General Synod. This leads Bogdanor to the conclusion that Parliament is "the nearest English equivalent of the General Assembly[260]." Set up in 1970, the General Synod of the Church of England is not rooted in the history of the Church as the

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[258] *Report of the Archbishops' Commission 1970* (1985), p 17.

[259] The Treaty of Union 1707 between Scotland and England.

[260] Bogdanor (1995), p 238

Scottish General Assembly. This weakens its claims to be the "true" representative of its believers.

During the 1919 debate in the House of Lords on the Enabling Act, the Marquess of Crewe also questioned this comparison, asking if the new Church Assembly being proposed by the Church of England was being modelled on the Scottish General Assembly. He asked

> "whether the promoters of the Bill have not been somewhat misled by the existence and the powers of the General Assembly of the Church of Scotland. The General Assembly of the Church of Scotland was the direct result of the political confusion existing in that country. The Scots Parliament during the sixteenth and seventeenth centuries was a welter of contending factions, and the Scottish people...determined to institute something of the nature of a parallel Parliament...and place it in charge of the moral and social interests of the country so far as, in those days, such matters came before any Parliament or Assembly at all. That was the origin and purpose of the General Assembly in Scotland. It represented then, just as it represents now, the extreme sensitiveness of all Scottish religious bodies, whether they be Episcopal or Presbyterian...[261]"

[261] HL Deb 01 July 1919 vol 35 c 7.

However this unfavourable comparison may change if the composition of the General Synod were to change in the future, though the historical differences between the two organisations will of course remain.

We can conclude that however onerous any future change maybe, there is precedence for change in the Church representative bodies and there is no legal impediment to the General Synod 're-branding' itself and changing its composition. The Church Assembly, which was set up after the 1919 Enabling Act, had a fifty year run before it was replaced by the current General Synod. The General Synod will be fifty years old in 2020. It looks like change may be forced on this institution if the current divisions in the Church of England on homosexuality, equality legislation and women bishops continue.

Although this is an internal decision for the Church of England, there is some merit in the argument that the time may have come to re-evaluate the role of the Church of England General Synod, even if the conclusion after such an exercise is that the legislative equation with Parliament remains in place. The internal politics of widening representation in the General Synod of the Church of England is beyond the remit of this dissertation. We will focus on how effective Church of England representative bodies have been in the past century to create a rival legislature to Westminster.

5.2 The Church Assembly

Rivalling Westminster was not the aim of the Church Assembly that was set up following the 1919 Enabling Act. Thompson points out that the establishment of the Assembly was greeted "with high hopes and deep fears in the early years". However as time went on "…it was to be regarded with indifference by many and disillusion by a few, so that in the mid-1950s another era of commissions and debates on the best form of government for the Church was ushered in...[262]".

The problem of representing different schools of opinion in the various components of the Church Assembly became evident from the very start and one way in which this was done was to increase the number of representatives in influential bodies such as the Standing Committee of the Church Assembly[263]. Later this need to represent all strains of opinion was criticised by one members of the Committee as weakening the efficiency of these bodies as members were often selected for their party affiliation rather than their personal qualities[264].

The growth of party affiliation within the Assembly was defended by one such party, the English Church Union in the *Daily Telegraph*, 25 March 1922 where the Secretary of the party defended party politics on the grounds that

[262] Thompson (1970), p 179.

[263] *Ibid.*, p 180

[264] George Goyner, *Church Times*, 6 November 1964, referred to by Thompson (1970), p 180.

> "Whether we like it or not, the Church is committed to representative assemblies having a quasi-Parliamentary constitution and organized on semi-political lines[265]".

Others such as Viscount Wolmer defended the party system in his article "The Church Assembly and the Clergy" in F. Partridge (ed.) *The Church Assembly and the Church*. The central point of Wolmer's argument was that the quasi-parliamentary character of the Assembly was conducive for discussing non-spiritual matters. There was however another unexpected element to this process of democratizing decision making which was the birth and growth of parties in the Church Assembly[266].

The problem according to Thompson was that

> The Church of England remained an institution subject to a large number of checks and balances, with several power and authority structures. There was the hierarchy of archbishops and bishops, the provincial and diocesan ecclesiastical courts and offices, the Convocations, Church Assembly, Church Commissioners, Parliament and the Crown, a widely diffused patronage system, and the parish priest with his inalienable freehold. The basic dilemma, which had faced the Church of England in its organizational response to social change,

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[265] *Ibid.,* p 181.

[266] *Ibid*., A detailed discussion of this can be found in Thompsons' book.

> had been to adjust itself to the process of differentiation of institutional domains, whilst at the same time maintaining its basic identity as a coalition of diverse principles of authority and doctrine[267].

In his book on *Religion and Society in Industrial England*, the historian, Gilbert suggests that the creation of a Church representative body was a big step forward as the State had a Church body it could interact with, and pointed out that,

> The restructuring of the Establishment was something *imposed* on it by a Parliament, which scarcely could afford to wait for some consensus about reform to emerge within the Church itself. Indeed, one of the most serious impediments to ecclesiastical reform during the early industrial age had been the prorogation of the Convocations of Canterbury and York during the entire period from 1717 to 1852. There was simply no administrative machinery through which the Church might have formulated policies requiring merely the constitutional legitimization of a Parliamentary Act[268].

The creation of the Church Assembly,

> "...gave the Church of England certain delegated legislative powers, by which it could prepare measures for submission to Parliament, which could then either reject or approve them but no longer itself initiate or amend such church legislation. The ultimate veto still remained with Parliament, however, and this

[267] Thompson (1970), p 237.

[268] Gilbert (1976), p 128.

> satisfied those church parties which had feared that a greater transfer of power to an autonomous church government would lead to the eventual exclusion of minority parties from the Church. In this respect it preserved the comprehensive, *ecclesia*, character of the Church of England...[269]".

In the early years the supporters of the Church Assembly were divided about the role the Assembly should be playing. Thompson describes the divisions within the Assembly in his Chapter "The Church Assembly and its Organization". In a speech to the assembly in 1921, the Bishop of London suggested that the role of the Assembly was to make a difference to the social and moral fabric of the country and only then would it touch the imagination of the people of the country. This view was opposed by others, such as Lord Hugh Cecil, who felt that the role of the Assembly should be confined to legislation and finance. The latter view prevailed and according to Thompson, during

> "…the first ten years of its existence, the Assembly's character was firmly fixed as primarily a legislative body…(B)y 1930 forty measures had been placed on the statute book, a few others had been rejected or withdrawn, whilst a number of others had been considered at length but were not finally complete. In this respect, therefore, the Church's organization was developing the first prerequisite laid down by Max Weber for a legal authority with a bureaucratic administration staff: the laying down of a body of law which would govern the

[269] Thompson (1970), p 242.

> corporate group within the limits laid down by legal precepts and following principles capable of a generalized rational formulation…[270]".

The setting up of the Church Assembly, following the Enabling Act, transformed how Church of England Bills became Law, although the *Church and State: Report of the Archbishops' Commission on the Relations Between Church and State, Vol. 1* (1936), seemed underwhelmed by these changes and in its assessment for the Church of England. The report did not think this was

> "a new concordant between Church and State. It left the constitutional relations of Church and State substantially unaltered. The sole legislative authority after, as before, its passing is the King acting by the advice of the two Houses of Parliament...Church Assembly is entitled to "frame legislation"...Parliament considers whether or not it shall advise the King to give effect to the legislation so framed...[271]".

The report also felt "the criticism of the Ecclesiastical Committee, from a purely lay point of view, and the possibility of a Parliamentary veto, afford a salutary check upon injudicious projects of reform[272]".

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[270] Thompson (1970), p 201.

[271] *Church and State: Report of the Archbishops' Commission on the Relations Between Church and State, Vol. 1* (1936), p 34.

[272] *Ibid.*, p 35.

5.3 The General Synod

A timeline of how the General Synod came into being and the internal enquires and divisions within the Church on the role of the two Convocations and the broadening of lay representation can be found in Eric Kemp's chapter "The creation of the Synod[273]" in Peter Moore's book, *The Synod of Westminster, Do we need it?*. Kemp makes an interesting point in his chapter about the "duality" of role that the Church representative body had to play. Referring to the Church Assembly, he mentions how Dr. Iremonger (who had been closely associated with William Temple and the Life and Liberty Movement) felt that the Church Assembly had "never come to a clear decision as to what its role was in the Church[274]". The same duality which the General Synod inherited from the Church Assembly of trying to be "the voice of the Church" on great national and moral issues; together with dealing with "the congestion of business[275]". Iremonger's analysis of the Church Assembly was that there was "a sharp and fateful struggle between two groups...the legalists and the moralists...legalists...were soon in control; the voice of the Assembly is now the voice of the administrator, not of the prophet...[276]".

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[273] Kemp (1986), pp 10-24.

[274] Kemp (1986), p 22.

[275] *Ibid.*, pp 22-23. Kemp suggestion was to try and reduce the legislative workload of the General Synod by narrowing the time for debate on these matters and freeing time for "more important issues concerning the life of Church and nation and perhaps in some cases prepare the way for legislation in the Synod". (p 24).

The inadequacy of the Church Assembly to communicate and include a broad spectrum of the lay member of the Church of England became evident soon after it was set up. As Garbett suggested in his book which was written prior to the setting up of the General Synod that,

> The smallness of the electoral role is at the moment a serious weakness. It will prejudice the influence of the Assembly, for when a controversial Measure is sent to Parliament, the question will be asked as to how far the Assembly is really representative[277]

In 1969, a new more inclusive Church body was established to address some of these difficulties. The framework set up by the 1919 Enabling Act continued to be the framework upon which Church Measures were scrutinised by Parliament. The only change for Members of the Westminster was that the participation of the laity was greater in the new Church chamber.

In 1970 the Church Assembly was renamed the General Synod of the Church of England and became part of the comprehensive system of synodical government created by the 1969 Act[278]. The Synod operated in the same manner as its predecessor but was

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[276] Iremonger, F.A. *William Temple, Archbishop of Canterbury* (1948), p 221, quoted in Beeson (1973), p 117.

[277] Garbett (1950), p 117.

[278] Synodical Government Measure 1969, s 2(1).

additionally empowered to legislate by Canon[279], a power which had till then only been vested in the two Convocations. Like the Church Assembly, which preceded it, any Measure passed by the Synod had to have the approval of Parliament before it could be implemented.

The changes introduced by the setting up of the Church Assembly and later the General Synod were most significant in the increase in numbers of lay participants who were involved in Church administration. Although not disputing the existence of lay participation prior to 1919 in Church of England matters, the view of Trevor Beeson[280]on the historical participation of lay members in the Church of England was that

> Although the voice of the layman has never been completely silenced, the Church of England has never been a 'lay church' in the sense that the great mass of those who make up its membership have been closely involved in its decision-making processes...the lay voices have been confined to those of an elite and lay influence...those who, by fair means or foul, have secured for themselves positions of power in the life of the nation. The ordinary 'man in the

[279] A Canon is a piece of Church legislation which does not affect the law of the country and therefore does not require any outside scrutiny, except for a check by the Home Secretary. Furthermore, it is in itself not binding on anyone except clerics, or, at least, ecclesiastical *personae*.

[280] Was the Dean of Winchester from 1987- 1996.

pew' has never had much say, either in the life of his local parish church or in the corridors of ecclesiastical power[281].

Beeson is harsh in his assessment of the Church assembly and suggests that, "to anyone who witnessed the Church Assembly in action during the 50 years of its life" would have been astonished "that so vigorous a reforming movement[282] had produced, as its sole achievement, so tedious and so ineffective an instrument of church government[283]". Beeson quotes Dick Sheppard[284] who wrote that "...I am tired to death of all this tinkering at domestic machinery, the reform of the Prayer Book, the multiplication of the Episcopate, and these countless committees and committeemen..."[285].

The experiment of the Church Assembly as an instrument of Church Government came to an end in 1970 with the establishment of the General Synod heralded with much fanfare as the Queen opened the first session of the new Church body. With the headline in *The Times* proclaiming "The Queen greets a new church era", the article pointed out that this was the first time that a British Monarch had attended an

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[281] Beeson (1973), p 114.

[282] Beeson reference is to the Life and Liberty Movement which had influential Church figures such as William Temple , Dick Sheppard and Cyril Garbett.

[283] Beeson (1973), p 116.

[284] An influential figure in the Church of England of that time, he vicar of St. Martin-in-the-Fields in 1914 (where he opened the crypt of the Church for the homeless), a pacifist, the first 'radio parson' for the BBC in 1924, Dean of Canterbury (1929-1931) and Canon of St. Pauls' Cathedral in 1934.

[285] Sheppard, *The Impatience of a Parson*, p 198, quoted in Beeson (1973), p 117.

ecclesiastical synod. It then quoted the speech of the Queen who described the setting up of the General Synod as a "radical development in the governing institutions" of the Church of England, reflecting "the changing needs of the church and its members in our times". *The Times* then quoted the Queen and her reference to the "act of faith" on the part of the Convocations (with its older heritage) and the fifty year old Church Assembly pooling "their powers so as to give the new synod of bishops, clergy and laity full responsibility for the government of the church[286]."

The view of Peter Moore in his book *The Synod of Westminster, Do we need it?* is less celebratory and optimistic than the vision envisaged by the Queen in her inauguration address to the General Synod. Moore points out that the lay members of the Synod are not elected by a direct vote and he describes them as being "one step removed from what is frequently referred to as the 'grass-roots' level" questioning "in what sense, the Synod is representative, and representative of whom?[287]".

Moore suggests that any comparison between a representative Church Body such as the General Synod and Westminster Parliament is problematic. The reason for this is "that Parliament produces a government which can change - and be changed. No such thing happens in the Synod. Thus there is little motive for hoping for, let alone for working

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[286] November 5 1970

[287] Moore (1986), p 1.

for, any significant change of policy[288]". Moore goes on to make the distinction between a member of the General Synod and an MP, pointing out that Members of Parliament

> "...are elected on party lines…are paid for doing a whole-time job. They can lose the support of their constituency or become leader of their party. They can make - and break - governments. And they are directly accountable to the total electorate who choose them…[289]."

Another reason why lay members of the General Synod are not as effective as ordinary Members of Parliament and therefore contribute less to the Church body is that half the lay participants in the new Synod are first-timers. New members were 54% of the General Synod in 1970 and 50.6% in 1975. Hugh Craig[290]argues that this high turnover in the House of Laity results in members taking

> "...time to get used to the Synod's procedures and to find the best way to make one's contribution, it follows that a substantial number of the House never make an effective contribution. The cause of the high turnover is a matter of speculation. The high time demands of the Synod encourage a disproportionate number of retired people to stand. The same time demands often discourage younger members as family commitments grow. The turnover is also influenced

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[288] *Ibid.*, p 2.

[289] Moore (1986), p 3.

[290] Hugh Craig, "A Question of Confidence" in Moore (1986), pp 25-43.

by disenchantment with the Synod, and by the fact that a minority of the House were unsuitable candidates for such work from the outset[291].

In the same chapter, Craig also expresses his concern about the way in which the agenda in the General Synod is heavily loaded, which "…assists in keeping debates short: it encourages intolerance of minority views which take up time: and it keeps the Synod so busy that it has not too much time to think or to question the platform…". In addition to this, Craig suggests that the "…idea is also fostered that the agenda is full of items that the Synod has itself asked for. In fact very little of the agenda is made up of items where the first initiative is from the floor of the Synod. The majority of it comes from the boards or councils or from the Standing Committees. Some indeed may be the result of motions of the Synod: but usually motions proposed by the platform, rather than the initiative of ordinary members…[292]."

Speaking from his own experience as a member of the Standing Committee for twelve years, Craig argues that the group dynamics of this Committee (presided over by an Archbishop) is such that even with the Archbishop "…acting with invariable

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[291] Moore (1986), pp 29-30.

[292] Craig gives an example of how as a member of the Standing Committee he tried to introduce a system by which the Synod could select the items it wanted to debate by way of a ballot. This was eventually adopted for private members' motion, but not for "official" motions. Thereby preventing the members from prioritizing motions for debate and preventing it from proposing that another subject could have been better use of Synod time. Moore (1986) pp 35-36.

discretion... the clergy… show a marked reluctance to oppose anything to which the archbishops have hinted their approval…[293]".

In his chapter, "Change- and Decay[294]" in the same book, Clifford Longley sees one of the weakness in the Synod being its structure which is based on the Westminster model. This is not the most conducive forum in which to discuss matters of morality and theology as this may not necessary have a

> "…binary solution where there are only two answers. The Synod is nevertheless designed to work that way. It is a parliamentary system, modelled on Westminster. All questions brought to the Synod for decision have somehow to be reduced to a formula, which can be tested, by a yes or a no vote. It helps the journalist, perhaps; but whether it helps the church is doubtful…[295]"

Gundry[296] is harsher than Longley in his assessment and suggests that one effect of the General Synod has been to stifle any creative movement within the Church such as the Evangelical Revival or the Oxford Movement of the past. He believes that

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[293] *Ibid.*, p 38.

[294] Moore (1986), pp 61-72.

[295] Moore (1986), p 63.

[296] D. W. Gundry, "The Need for Revision" in Moore (1986), pp 44-60

> "…one of the problems of the present General Synod is its inevitable bias towards compromise and mediocrity. Strong government is hardly likely from such a democratic assembly whose 'cabinet' (the standing committee) and whose 'cabinet ministers', also acting as regional commissioners (the bishops) are a curious kind of permanent coalition…[297]"

Describing synodical government as a "Victorian period piece, born out of time", Gundry suggests that one of its flaws is that it

> "…apes Parliament and is wedded to the committee process, yet without those very features which make political parliamentary government workable. Although parties exist in the Church and are at times influential behind the scenes and at the quinquennial synodical elections, there is no party government and no change of ministers...[298]"

Gundry argues that

> "The present form of synodical government is debilitating the Church of England. Not nearly enough critical examination has been made of the philosophy underlying this kind of ecclesiology and its effect. The Church Assembly and then the General Synod naively accepted a kind of ecclesiastical socialism as the appropriate way of organizing the Church today. The essence of

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[297] *Ibid.*, p 46.

[298] *Ibid*.

> such a system is centralization…(T)he General Synod assumes that it alone speaks for and acts for the Church of England…[299]".

In an article in the Ecclesiastical Law Journal (published in 1991), the former Bishop of Rochester, David Say made what he called some "minor prophecies", which was

> "...a second stage in synodical government coming about led by those who have known no other system and who will, I suspect, find their way in time to fewer meetings and to less legislation. I see a recovery of the confidence between Parliament and Synod, once the present Ecclesiastical Committee of Parliament ceases to try to redefine "expediency" as it has been understood since the 1919 Act and also stops trying to go beyond its brief. Co-existence will always be subject to periods of turbulence...[300]."

Looking at his first prophecy about the Synod, it seems that is something that may eventually happen, as there seem to be enough discontent around on how the Synod is working for a re-think on the structure and responsibilities of this body. Any restructuring, however, raises questions for the status of the Establishment of the

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[299] Moore (1986), pp 50-51.

[300] Ecclesiastical Law Journal 1991,2: 152-158.

Church of England. If the lay element and lay participation were to increase in a "new" General Synod, the question of the role of Parliament could well arise. This could then be used to justify demands from the Church to take over the legislative reins from the State and finally be free to legislate for itself.

5.4 The legislative responsibility

The role of the General Synod of the Church of England is to draft a Measure[301] which has the full force and effect of an Act of Parliament following approval by both Houses of Parliament and getting Royal Assent[302]. A Measure can relate to any matter concerning the Church of England 1919, s 3(6) applied by the Synodical Government Measure 1969 s 2(2). On occasion, the quality of drafting of Measures has come in for criticism. In the debate in the House of Commons on the Ordination of Women Priests, the Labour Party Member of Parliament, Frank Field who was also a Member of the Ecclesiastical Committee suggested that

> "…the Measure is a dog's dinner. The way in which the Synod produces legislation allows Measures to be ambushed by one group and thereby changed. There does not seem to be any overall responsibility for a Measure. We understand that the next Synod may set up a commission to consider the relationships between Church and State. It has every right to do so, although whether this place will take much notice of its report is another matter. I hope

[301] The Synodical Government Measure 1969, s 2(1), Sch 2 art 6(a)(i).

[302] Church of England Assembly (Powers) Act 1919, s 4

> that the Synod will also consider its own house and the means by which it puts together major legislation, because this House only has the power to accept, not to amend or reject, such legislation. Most people who are fervently in favour of the Measure do not think that the details are as satisfactory as they could be…[303]".

This is an inherent weakness in the current system as the drafting and wordings of the Measure presented by Legislative Assembly of the General Synod cannot be amended by Members of the Ecclesiastical Committee.

According to Cornwell, the problem with the way in which the Synod operates is that it is unable to put sufficient distance between itself and the Palace of Westminster and that the,

> "...shadow of its illustrious neighbour seems to encourage members of Synod to play at being members of Parliament and to indulge in a confrontation form of politics, appropriate enough in a body which contains not only Her Majesty's Government but also the official Opposition, but ill suited to an assembly which should be seeking, beyond the pressures of various factions, what is the truth of God...[304]".

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[303] *HC Deb 20 March 2001* c 1100.

[304] Cornwell (1983), p 32.

The Synod is composed of 560 members and is composed of three houses, the bishops, clergy and laity. Describing the composition of the Synod, Moore, Stamp and Wilson argue that the process by which a small number of church-goers vote for parochial church councils who then vote for deanery synods who ultimately elect the members for the house of laity means that "democracy"

> "..is mitigated by a good many intermediate steps. Most 'men in the pews', let alone most nominal members or irregular attenders of the Church, know nothing of these arrangements. The result is that the laity, which takes an interest in the Synod, is untypical of congregations. It requires a special sort of mind to wish to fulfil the work of the Holy Spirit through the machinery of the General Synod…[305]".

Moore, Stamp and Wilson go on to say that to participate in the General Synod, a lay member has to be able to participate for eleven full days a year (there are two sessions in London and one in York which usually take place over week days as members of the clergy are busy on Sundays) which "...requires a special sort of occupation..." which the authors suggests means that "...almost all the lay people taking part are either rich or old, or both, and not enough of them have strong connections with unecclesiastical occupations..."[306]. They go on to say that "...such a body is bound to be middle-aged

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[305] Moore, Stamp and Wilson (eds.) (1986), p 13.

[306] Giving the example of the drop of numbers of MPs participating in the General Synod in the 1980s (excluding the co-opted members, there are only four) as against the eighteen MPs who were members of the Church Assembly in the late 1940s. Moore, Stamp and Wilson (eds.) (1986), p 13.

(and upwards) and middle-class, and to attract activists more than people of broad minds and independent judgment...[307]".

Hastings quotes from a letter written in 1972 by Mervyn Stockwood, the Bishop of Southwark (1959-1980) where he described the General Synod,

> "...as a disaster, a playground for bureaucrats or bores. Worse still is the time wasted on endless chatter and the money wasted on cascades of memoranda and minutes, stamps, envelopes and secretarial expenses...[308]"

Hastings own opinion on the General Synod (the fourth edition of his book covers the period from the 1920s to 1985) is that a case can be made against its,

> "...rather mediocre cautious conservatism, the fallaciousness of rule by democratic centralism. On certain key issues it has a paralysing effect, several times restraining a more adventurous and open- minded episcopate. As a whole its lay membership (as indeed, its clerical membership) has been elderly and from the educated class...[309]".

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[307] *Ibid.*, p 14.

[308] Hastings (2001), p 609.

[309] *Ibid.*, However, he does acknowledge that despite the defects of its membership, the General Synod has been a "credible" legislature for the Church of England and one which has "in a serious way combined Catholic and Protestant tradition". This maybe a good place to mention that very early in my research, I realised it was important to try and understand the religious background and political beliefs (as much as that was possible) of the writer before reading what they had written on this subject as it coloured their outlook and often their reading of History.

In the debate initiated by Sir Hal Miller on Moral Values[310] in 1989, Sir John Stokes, MP for Halesowen and Stourbridge made the pointed remark that:

> If bishops did their job properly, there would be no need for the General Synod. The laity could make their views known at parish level. I joined the Synod some years ago on the basis of, "If you can't beat them, join them." I have been somewhat disappointed. The Synod meets too often, it seldom discusses basic issues and it is frightfully expensive for the parishes to maintain. Moreover, it is building up a bureaucracy, which poses dangers to the well-being of the Church. The Synod takes up too much time of the bishops and the higher clergy[311].

Hastings criticism of the General Synod in the 1970s and 1980s was not just that it was slow and bureaucratic, but also "conservative" and "cautious". He points to the rejection by the General Synod to allow divorcees to be married in Church in 1973, 1978 and again in 1985 and the rejection and the disregard in 1972 by the General Synod of Ramsey's plea to accept the Anglican-Methodist reunion as indications of this attitude. Hastings goes on to suggest that the "day both of the great scholar-bishop and of the great politician-bishop (or, indeed, the eccentric prima donna) seemed almost over" in the Church of England. (It can be argued that the current Archbishop of Canterbury

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[310] HC Deb 13 February 1989 vol 147 cc 24-68.

[311] *Ibid.*, c 34.

Rowan Williams does have shades of the "scholar-bishop" in him, not least the druid like flowing white beard that gives him that added scholarly gravitas!)

Moving to more recent debates and the role played by the General Synod in the past five years, the story remains a chequered one. In an interesting piece in *The Guardian* in 2008 on the splits in the Church over the issue of women Bishops in the Church of England, the author suggests that the General Synod may become a staging post for those opposed to the move. One of the strategies suggested by the opponents of the vote to allow women Bishops was to ensure that "their members" were successful in the General Synod elections, which were due in 2010. The alliance referred to in the article was between the conservative group, Forward in Faith, joining "forces with evangelicals, who are unhappy with the ordination of gay clergy, to fight for control in the Church of England". The article explained how achieving adequate seats in the General Synod was critical for ensuring their control. They would then use this majority to win the final vote that was to take place in few years' time. Synod elections took place every five years and the next elections were due in 2010. With these factions working together, instead of contesting the same seats, they could secure enough dioceses to defeat the movement towards women bishops. The article quotes Synod member Paul Eddy who said:

> "This is a fight for the centre of the church. We have far more in common than divides us. I am an evangelical, but I voted with the Catholics all the way....Increasing the conservative profile within synod membership would "push off" legislation on women bishops for at least a few years, he added, possibly until the next re-election of synod in 2015… There are about 14 bishops who are due to retire, and most are

> from the liberal wing. There will be greater pressure to appoint traditionalists".

The conundrum of having a strengthened General Synod in the future is that it may end up with a majority of "activists" who may represent a narrow/sectarian interest and use their position in the Synod to force changes, which may not be acceptable to the majority of Church goers who are not represented in the Synod. Bogdanor makes a similar point in his book *The Monarchy and the Constitution* that:

> The Church of England, therefore, should not be dominated by the activists of the Synod, but parliament also, as representing the "folk religion[312]" of the nation, should be allowed to express its point of view[313].

There is of course another role of the General Synod, which is less controversial and has to a large extent been very successful. In a debate in the House of Commons on the Churchwarden Measure, the Conservative Party Member of Parliament Peter Bottomley had this to say about the role of the Synod:

> Although I agree with Robert Runcie, who said that using the Synod for the earlier stages of parliamentary Measures was not entirely satisfactory, it is

[312] The term "folk religion" was used by John Hapgood to describe how often those who would not necessarily call themselves religious used religious rites to mark birth, marriage and death. Bogdanor (1995), p 231.

[313] Bogdanor (1995), p 232.

> probably more satisfactory than a system involving the two Houses dealing with Second Reading, Committee stage and Report. In practice, the Ecclesiastical Committee must bring a Measure that has gone through its earlier stages in the Synod to the House of Commons for what is, in effect, Third Reading. That is surely a better system than one involving fighting the whole thing through from the beginning[314].

This is an important contribution made by the Church of England's General Synod as the Parliamentary timetable is packed and it is not unusual to find Church of England Measures being discussed in the early hours of the morning as that is the only available slot for the debate. The success of the Church Assembly and then the General Synod, which replaced it to take over the onus for initiating legislation for the Church of England, was very significant. By ensuring that Parliamentary time on debating Church of England matters was reduced to a minimum, the Church of England ensured that it got Parliamentary approval for its Measures and no longer faced the doldrums of the pre-1919 days when very little of what the Church of England proposed to Parliament for approval got debated and even less of the Bills got approval. It should build on that success rather than try and claim to be a truly representative body of its practitioners, a role that maybe hard to justify or sustain.

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[314] HC Deb 20 March 2001 vol 365 c 310.

CHAPTER 6. THE CASE STUDIES

This section of the thesis looks at some recent Measures that were considered by the Ecclesiastical Committee and subsequently by Parliament. The Measures selected for this case study chapter cover the period from the beginning of Margaret Thatcher's first term as premier (May 1979) and ends with the end of Tony Blair's' second term in office which began in June 2001. A total of 38 Measures were approved by Parliament during this period from May 1979 to May 2005[315]. While the formal powers that Parliament retained over the passing of Measures appeared to be very limited under the 1919 Act, an investigation of the passage of particular Measures shows a more complex and nuanced story.

6.1 Introduction

As discussed in the previous Chapter, a unique legislative procedure was established for approving Church of England Measures by the 1919 legislation. This process was clearly a compromise of trying to keep "checks and balances" in place by finding a middle ground between Church of England aspirations for greater freedom and the historical role of scrutiny of Church law provided by Parliament. These procedures set up by the Enabling Act was frustrating for many Members of Parliament who found the restrictions were contrary to their expectation of an unfettered right to suggest amendments to bills. This frustration was encapsulated in the comment by Earl

[315] http://www.legislation.gov.uk/ukcm?title=Measure (accessed 14th August 2011).

Waldegrave during a debate on the floor of the House on a Church of England Measure when he said "there can be no fear of Erastianism here[316]". He was referring to the control of the State over the Church, which was minimal under these arrangements. The case studies in this chapter show how this "slight control" by Parliament worked in practice and we find that contrary to expectations, Parliament often did exercise a real degree of control over the legislation affecting the Church. This process is examined through a number of Measures that are discussed in this chapter.

6.2 Reason for selecting the four case study Measures

The four Measures selected for analysis in this chapter illustrate how the Ecclesiastical Committee and in some cases the House of Commons were able to wriggle out of the straightjacket they found themselves in as a result of the procedures established in the Enabling Act of 1919 for scrutinising Measures. In practice, Parliament found ways of forcing the Church to re-think legislative proposals. The first case study is the Appointment of Bishops Measure 1984, which was found to be expedient by the Ecclesiastical Committee (albeit with the Church having to make special representations before the Committee to justify the Measure). This Measure was rejected by the House of Commons with some Members (such as Enoch Powell) seeing themselves as the "custodian" of traditional values of the Church and rejecting attempts by the Church to modernise the process by which Bishops were appointed. The irony that it was

[316] HL Deb 14 November 1974 vol. 354 cc882-883

Parliament in this case that acted to preserve the traditions of the Church may not have been lost on some of the members of Selborne's Committee.

The message from Parliament, by rejecting what could be categorised as an internal administrative matter was a reminder to the Church of England that the Church was still "accountable" to Parliament (despite the changes from the 1920s which gave the Church greater freedom). It is difficult to judge whether this rejection acted as a deterrent to the Church to think more carefully before sending laws to Westminster which tried to change the traditional and symbolic traditions of the Church. Ironically, the Church has not attempted to bring this matter back to Parliament since the rejection of this Measure in 1984.

The second case study is the 1989 Ordination of Clergy Measure where in a highly charged late night debate the Measure was rejected by MPs despite having gone through due process in the General Synod. The Measure was subsequently approved in the new session of Parliament in 1990. Both these case studies have something in common. A narrow approval in the Ecclesiastical Committee was reversed in the House of Commons after strong arguments by members of the Ecclesiastical Committee who had concerns with the Measures concerned and who were then instrumental in getting both Measures defeated when it came to the floor of the House for discussion.

The next two case studies have been selected to reflect other aspects of the workings of the Ecclesiastical Committee. These two case studies were cases where the Measure

was analysed by the Ecclesiastical Committee for its impact on the rights of Her Majesty's citizens. The second case study, The Ordination of Clergy 1989 was narrowly defeated in the House of Commons by a sparsely attended session. This does give some credence to the views often expressed by Church of England senior clergy that Church legislation could be blocked by a minority of Members of Parliament who seem to be driven by political and religious ideology and not concerned with looking at the merit of a Measure dispassionately. This could be seen as an "undemocratic" abuse of the power given to the Members of Parliament it by the 1919 Enabling Act. The flip side of this argument is the accusation levelled against the Church (as evident in the debate on the floor of the House) of the Church treating Parliament as a "rubber stamp". In this case the Church clearly thought the outcome was unfair and the rejected Measure was re-submitted to Parliament after some changes.

The third case study related to the Ordination of Women Priests Measure and the related Measure for financial compensation were not scrutinised by the Ecclesiastical Committee for the change that women Priests were going to bring to the Church but rather for the impact on Clergy and parishioners. The Ecclesiastical Committee focussed on the employment future and financial protection of those clergy who were adversely affected by these Measures. The adversely affected members of the Church were those who felt they were unable to accept women as Priests and therefore could no longer continue in their chosen profession due to the changes being introduced by the Measures. It is an interesting example of how the Committee executed their role of looking at the impact on "all citizens" when deciding if a Measure was "expedient". The narrow approval in the Ecclesiastical Committee was not reflected by the

substantial approval in the House of Commons when the Measure came before them. Was this a reflection of the 'conservative' and 'cautious' composition of the Ecclesiastical Committee of that time. Although the need never arose, it would be interesting if the Ecclesiastical Committee had rejected the Measure. Would this have resulted in a backlash from the Church and media? An analysis of the Membership of the Ecclesiastical Committee is not part of the research undertaken in this thesis. The question that would have arisen had the Ecclesiastical Committee rejected this Measure was how members got "nominated" to serve on this Committee. A debate on whether the process of nomination to the Committee should become more transparent and a balance of ideological and religious affiliations reflected in the Ecclesiastical Committee. These issues may become relevant in the future if the Ecclesiastical Committee was to reject a future Measure such as the consecration of Women Bishops.

The fourth and final case study is the 2001 Churchwardens Measure which went through a difficult passage in the Ecclesiastical Committee whose members were unhappy with the way in which the Church was trying to construct a dismissal process for churchwardens without adequate safeguards and redress for the churchwardens affected. After having failed to get approval from the Ecclesiastical Committee for this Measure, the Church eventually dropped all the clauses with which the Committee had issues and was able to get the Measure approved by Parliament. Like the Ordination of Women Measure, the Ecclesiastical Committee looked at the impact of this Measure on Churchwardens as it felt that the clauses allowing Bishops to remove Churchwardens undermined their employment position. This is an interesting case where the Ecclesiastical Committee came out as the knight in shining armour to rescue the rights

of the "common man" against the arbitrary action of the Church. This was probably the most 'glorious' contribution by the Ecclesiastical Committee since its inception. A protracted negotiation eventually resulted in the Ecclesiastical Committee getting rid of a controversial clause in the Measure. A lesson, which will not be lost on the Church of England, which has adopted the practices and methods of employment of a "modern employer" (no more 'hired by God' nonsense!).

The framework used in this Chapter has been adapted from the structure used for the *Research Papers* prepared by the House of Commons Library prior to a Bill being debated and voted on by MPs[317]. In the House of Commons *Research Papers*, the first section looks at the legislative background of the proposed Bill. This is followed by a section on the proposals put forward by the Government or White Papers related to the Bill. There is then a detailed breakdown of the clauses, followed by a last section that looks at any comments or responses to the proposed Bill. This structure was more appropriate for the analysis of the various aspects of the Measures that concern us compared to some of the other methods of presentation used in legal case studies, such as J.A.G. Griffith work on private member bills[318].

Each Measure is looked at under four headings. The first looks at why the Measure was introduced, the second looks at the role of the Ecclesiastical Committee. Under the third

[317] Am grateful to Susan Hubble; who works at the Social Policy Section at the House of Commons Library for her help and advice and getting me copies of research papers prepared by her office.

[318] Griffith (1974).

heading we summarize the debate in the House (for those Measures found expedient by the Committee and presented to Parliament after the Legislative Committee of the General Synod had given its consent). Under the final heading we comment on or provide an analysis of the Measure.

The remit of the Ecclesiastical Committee in considering Measures forwarded to it by the Church of England was set out under s2 of the Enabling Act of 1919. The power to initiate and formulate legislation for the Church of England was transferred to the Church Assembly and then after the 1969 Legislation to the General Synod (specifically to the Legislative Committee of the General Synod). This "autonomy" of the Church from Parliamentary control was further strengthened by the 1974 Doctrine and Worship Measure that ensured freedom to the Church from Parliamentary interference in matters of worship and prayer.

For some Members of Parliament, like Tony Benn, when a Measure was presented to the House, the members of the House had no choice but to support it as "...the Church wants it… the Church of England, being a state-controlled Church, can at present achieve what it wants only if the House votes for it...[319]". At the same time, the Church was also granted freedom from Parliamentary interference enshrined in law. The integrity of this law had to be maintained by Parliament, as reiterated by Lord Brooke of

[319] Tony Benn, HC Deb 20 February 1990 vol 167 c888.

Cumnor during the debate on the Church of England (Worship and Doctrine) Measure 1974[320] in which he warned the House that rejecting the Measure would be

> …the worst declaration of no confidence in the General Synod that there could be. The General Synod exists now with the authority of Parliament, one may fairly say with the will of Parliament...Members of Parliament...if we reject its recommendations when they come to us in a Measure like this, we must be fully conscious that we are also rejecting the General Synod machinery as a whole. To my mind, it would be a matter of disgrace if, after a Measure has been carried almost *nemine contradicente* in the General Synod[321], either House of Parliament were then to presume to defeat it and not allow the will of the overwhelming majorities in the General Synod to prevail[322].

In effect what Lord Brooke was suggesting was that Parliament should respect the wishes of the General Synod which was the appropriate body to legislate for the Church. The Synod was now an effective representative body of the Church due to the inclusion of a lay component in its structure (a lay element which had been missing in the Church Assembly which had preceded the General Synod).

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[320] HL Deb 14 November 1974 vol 354 c867-945.

[321]The combined votes from the three houses of the General Synod, was 344 in favour and 10 against.

[322] HL Deb 14 November 1974 vol 354 c887.

The case studies show this was a view that was not universally shared by members of the Ecclesiastical Committee and MPs over the last few decades. Unapologetically, the Ecclesiastical Committee stepped in and used its limited powers to assert its influence and in some cases used their right to declare a Measure as not being expedient as a tool to force the Church to re think and reformulate policies that had already been approved by the Synod[323]. By examining the legal procedures and in particular the way in which MPs, the Ecclesiastical Committee and the Synod created and used opportunities inherent in the legal structure, we can use the legal lens to assess the way in which Establishment actually operates.

6.3 Appointment of Bishop Measure 1984

Why was this Measure introduced?

This Measure attempted to change the appointment process of Bishops by eliminating some traditional rituals, which included some form of an "election" (which the Church argued was a "bogus" process) and remove some other steps such as invoking the Holy Spirit for guidance as part of the appointment process. At the start of the Ecclesiastical Committee Report on the background to this Measure, the Report pointed out that "in no way affects the legal position whereby all bishops are appointed by the Crown". This

[323] The Churchwarden Measure 2001 was an example of this tactic.

was just a Measure to change the "procedure that has to be followed for the purpose of carrying the Crown's appointments into effect"[324]. The Report went on to set out the process of formal appointment which was

> "...laid down in the Appointment of Bishops Act 1533, whereby the dean and chapter of the cathedral of the vacant see elect the Crown's nominee pursuant to a conge d'elire and letter missive from the Crown. The conge d'elire is a licence under the Great Seal to proceed to the election and the letter missive contains the name of the person to be elected. The Act leaves, no discretion to the dean and chapter: if they fail to elect the person named within 12 days (a failure which formerly attracted the penalties of praemunire) the Crown can nominate and present its candidate by letters patent under the Great Seal...[325]".

The Report then set out the reasons why the Church of England had requested a change from the traditional process of appointing Bishops. For one, the evidence cited by the Church was that it was a waste of time and money and for some Members of the Church "wrong in principle". The aim of this draft Measure was to "abolish the congie d'clire and letter missive, and the election by the dean and chapter will nominate its appointee by letters patent."

In the section in the Report where the Legislative Committee of the General Synod set out the reasons for wanting the Measure passed by Parliament. The first reason given

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[324] 1983/84 HL 251, HC 497 Ecclesiastical Committee 188th report. Report by the Ecclesiastical Committee upon the Appointment of Bishops Measure. p 3.

[325] *Ibid*.

was that the change proposed in the Measure was "...designed to modernise law and practice in an area of ancient Church law which has long been felt to need reform...[326]". There would be a change in the ceremony that normally followed the appointment of a bishop which was

> "...ceremony of confirmation of that election which is customarily undertaken by the Vicar-General of the Province. The Measure will provide instead for an occasion of record, over which the Archbishop of the Province will normally preside and at which the Crown's nomination will be formally received and recorded...[327]".

The Report listed the votes from each House of the General Synod when this Measure was presented to them and the House of Bishops was unanimous in its support, House of Clergy 101 votes in favour and 5 against and the House of Laity had 101 in favour and 3 votes against the proposed changes.

Response of the Ecclesiastical Committee

Despite the obvious support in the General Synod for this Measure, certain members of the Ecclesiastical Committee were unhappy about the proposed changes and had requested a preliminary meeting with members of the General Synod to ask for certain clarifications. This meeting took place on the 10th of April 1984.

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[326] *Ibid*., Para 3. p, 5

[327] *Ibid*.

The number of representatives from the House of Commons on the Ecclesiastical Committee who attended this meeting were:

Mr Frank Field, Mr Michael Latham, Mr John Page, Mr William Ross, Mr Roger Sims and Sir WiIliam van Straubenzee[328].

The House of Lords outnumbered the Members of the House of Commons on that day by 2 to 1.

Lord Beaumont of Whitley, Lord Bishopston, Lord Collison, Lord Gainford, Lord Luke, Lord Robertson of Oakbridge, Lady Saltoun, Lord Sandford, Lord Terrington, Lord Teviot, Earl Waldegrave and Lord Westbury.

The representatives from the Church of England were:

The Bishop of Rochester (who was a Member of the House of Lords), Professor J. D. McClean who was Vice-Chairman, House of Laity, Mr W. D. Pattinson (Secretary General) and Brian Hanson the Legal Adviser of the General Synod

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[328] Sir William Radcliffe van Straubenzee was a practicing solicitor prior to becoming a Member of Parliament in 1959. Sir Straubenzee was chairman of the Young Conservatives from 1951-53 and chair of the conservative think tank Ashridge till 1954. He was awarded an MBE in 1954 for his political service. After an unsuccessful attempt to become Conservative Party member for Clapham in 1955, Sir Straubenzee represented the constituency of Wokingham from 1959 to 1987. He served as Northern Ireland minister from 1972 to 1974.

On being asked asked why the Church of England wanted to change the procedure, Professor McClean pointed out that the election by dean and chapter was not really a "free election". It was also an expensive exercise as pointed out as the ceremony for involved "...an ecclesiastical judge, the Vicar General of the Province, a member of the Bar, advocate for the bishop elect, a solicitor representing the Dean and Chapter, and various other officials....[329]".

On being questioned by Mr. Latham on what concerns this raised for the Church, Professor McClean replied that

> I think they relate partly to the involvement of lawyers...there was a feeling that the Church had become too much in the hands of lawyers and that this whole business of appointing a Chief Pastor should be seen as a pastoral matter and not a legal matter[330].

For some Members like Frank Field and Mr. Latham, the changes on its own were not so much a concern as it seemed to be, as Mr. Latham suggested an indication of the "wilder mind" of the Church and indication of "restless alterations" to follow[331]. By a very narrow margin, the Measure was found expedient and was presented to Parliament for approval.

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[329] *Ibid*., Para 3, p 9.

[330] *Ibid*., Para 8, p 9.

[331] *Ibid*., Para 16, p 11.

Debate in Parliament

Once the Measure reached the House of Commons, the Members voted it down after a debate spearheaded by Enoch Powell and Patrick Cormack (who was a member of the Ecclesiastical Committee). In an interesting start to the debate, Powell raised a point of order where he wanted clarifications from the Leader of the House of Commons that the Measure was not a "Government" Measure and therefore did not necessarily enjoy their support. Following this many Members of the ruling party voted against the Measure. The Measure was not re-submitted to the House.

Prior to the debate starting, a point of order was raised by Enoch Powell. He had given notice of this and for this reason, the Leader of the House of Commons was present to answer the query. Powell began by asserting that the Queen's consent, which was given on the advice of Ministers, could be taken for granted in legislation associated with the Government. There was however a difference vis-à-vis Measures related to the Church. He went on to say

> "...that this instrument is peculiar because it is, I take it, not a Government measure. Moreover, it emanates from an assembly in which, unlike this assembly, the Government enjoy neither a majority nor decisive influence. If the motion to be moved is passed by the House and the other place, the measure will be presented automatically for Royal Assent. In that sense, this is the last as well as the first opportunity that the House has for expressing an opinion on it and that the Government have of exercising any influence, which they wish to bring to bear. In those circumstances, Mr. Deputy Speaker, I submit that it might

> naturally be assumed from the Queen's consent being made available that the measure enjoys the Government's support and approval. If that is not the case, I submit to you, Mr. Deputy Speaker, and to the Leader of the House that the Government owe it to the House to make it clear, before the debate commences, whether that is the case...[332]".

Responding to this, the Lord Privy Seal and Leader of the House of Commons, Mr. John Biffen stated that

> "...I confirm my understanding that the signification by a Privy Councillor of the Queen's consent to a motion does not necessarily imply the Government's support for the measure..."

This assertion had "a note of ambiguity" for Enoch Powell and he pressed the Leader of the House to confirm that "this is not a measure to which the Government are a party or on which the Government, as a Government, have a view". This was then confirmed by John Biffen.

During the debate, concern was expressed by Members from both sides of the House on the impact this Measure which on the face of it was an attempt to simplify the appointment process of a Bishop, but was seen by some Members of the House as an attack on the ancient rituals of the Church. Changes, which in Powell's view, were "more than symbolism". Enoch Powell went as far as accusing the Synod of using this

[332] HC Deb 16 July 1984 vol 64 c126

Measure as a guise "...to carry the Church of England further and further towards a system of internal self-government...[333]". He then proceeded to say that

> It is possible to have an internally self-governed church in this country, but it will not be the national church, it will not be the Church of England. The church is the Church of England because of royal supremacy, because there is royal - that is to say, lay - supremacy. It is for that reason that it is the church of the people and the church of the nation, and can never be converted into a mere sect or a private, self-managing corporation[334].

Members such as Sir Peter Mills felt that the "...House should be the long stop, and it has proved wise in the past to have a long stop. The House must continue that role...[335]". He went on to say

> "...I am glad that so many hon. Members are present. That is usually the case when we have such debates, and long may it continue. The established Church cannot have it both ways and it would do well to heed what we say tonight...[336]"

Others such as Sir John Biggs-Davison[337] complained about the way in which

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[333] HC Deb 16 July 1984 vol 64 c133

[334] *Ibid.,* c133

[335] *Ibid.,* c 134

[336] *Ibid.*

[337] Sir John Alec Biggs-Davison (son of Major John Norman Biggs-Davison, RGA) was raised as a Roman Catholic. As a Member of Parliament, Sir Biggs-Davison was a strong supporter of Enoch

"...The measure has been brought to us late at night with a minimum of information...for a scandalously short debate...[338]"

In a powerful speech, Patrick Cormack attacked the measure and stated that

> "...those of us who sit on the Ecclesiastical Committee are sometimes a little perturbed about the arrogance - I use the word advisedly and deliberately - of the Synod of the Church of England, when it comes to consider the role of Parliament because in effect it says, "If you question the wisdom of what we are doing in Synod, you are moving us towards disestablishment." That threat is implicit, time and again, in what is said to the Ecclesiastical Committee. Yet that committee, a unique body composed of Members of both Houses, has a duty, which we sometimes shirk for fear of a confrontation. I would not seek confrontation. I would not welcome it. I would be reluctant to disturb the delicate balance between Parliament and Synod. Yet, a balance presupposes that there are two sides, and that one side should not always be up and the other down. I regret that there are friends in the Synod who treat Parliament as though it were a dead letter. I hope that, tonight, Parliament will show...that it is not a

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Powell's anti immigration rhetoric and opposed the position of the Government over the Suez Canal (resigning his whip over the issue). He also spoke out in defence of Rhodesia during debates in the House and against making concessions to the republicans in Northern Ireland. He began his political career as Member of Parliament for the Conservative Party, representing the constituency of Chigwell in 1955. He died as a serving M.P. for Epping Forest in 1974. Sir Biggs-Davison was an active member of the Conservative Monday Club from 1962 to his death in 1974.

[338] *Ibid.*, c135

> dead letter...(I)t may be the sweeping away of a measure 450 years old that has something of a semblance of a farce, but for many of us it is far more than that - it is the erosion of part of the delicate and precious fabric of the Elizabethan settlement. That is what it is all about.[339]"

In the end at 12.21 a.m. the House divided and the Measure was rejected by 32 votes to 17. Among those voting against this Measure were members who were not from the Church of England, such as Rev. Ian Paisley who argued the changes being instituted by this measure as an attack on the important and distinctive doctrines of the Christian faith and went as far as suggesting that it was "...an attack on the person of our Lord Jesus Christ...".

Comment

The rejection of this Measure was interesting as the indication after the acceptance of the 1974 Worship and Doctrine Measure by Parliament was that it would not directly interfere with doctrinal issues of the Church. It is debateable whether this change in the appointment process was really a doctrinal issue. It may have worked as a shot across the bow for the General Synod who were made aware by the reaction and opposition in the House of Commons to this Measure than many in Parliament still considered themselves as the 'custodian' of the values and traditions of the Church of England. And

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[339] *Ibid*., c137

it is interesting that the Church of England did not attempt to bring this Measure back to Parliament in an amended form.

Following this rejection by the Commons, the Church of England faced another rejection of one of its Measures with the Ordination of Clergy Measure in 1989 which is discussed in this section. In that case the Measure was re-submitted for consideration in the next session. Despite several decades having passed since the rejection of this Measure, the Church of England has not returned to the subject of how to modernise the appointment procedures for Bishops. Clearly any loss of ancient rituals and rites was not something certain Members of Parliament were willing to accept the night of the debate in the House of Commons.

6.4 Clergy Ordination Measure 1989[340]

Why was this Measure introduced?

The aim of this Measure[341] was to make changes to the Clergy (Ordination and Miscellaneous Provisions) Measure 1964[342] and allow candidates, who had been divorced, to be considered as candidates for ordination in specific and exceptional circumstances, thereby removing the blanket ban, which had been in place so far.

The 1964 Measure had set out in: PART I - ORDINATION

Certain impediments to order.

9.-(1) No person shall be admitted into Holy Orders who has re-married and, the wife of that marriage being living, has a former wife still living.

(2) No person shall be admitted into Holy Orders who is married to a person. who has been previously married and whose former husband is still living.

The proposed changes in the 1989 draft were to "amend the law relating to impediments to admission into Holy Orders". This required the Modification of provisions relating to effect of certain remarriages on admission into Holy Orders(1964 No.6). In a section which addressed the effect of certain remarriages on admission to the Holy Order, the new Measure read:

[340] HC Deb 17 July 1989 vol 157 cc174-93. HL Deb 03 July 1989 vol 509 cc1012-54

[341] HC Deb 17 July 1989 vol 157 cc174-93. HL Deb 03 July 1989 vol 509 cc1012-54

[342] Clergy (Ordination and Miscellaneous provisions) (no. 2) measure 1964. H.L 114. H.C. 206.

1. For section 9 of the Clergy (Ordination and Miscellaneous Provisions) Measure 1964 (certain remarriages to be impediment to ordination) there shall be substituted the following section-

9.-(1) unless a faculty has been granted by the Archbishop of the province in pursuance of a Canon made under subsection (2) of this section, a person-

(a) Who has remarried and, the other party to that marriage being living, has a former spouse still living, or

(b) Who is married to a person who has been previously married and whose former spouse is stil1living, shall not be admitted into Holy Orders.

(2) It shall be lawful for the General Synod to make provision by Canon for empowering the archbishop of a province, on an application made to him by the bishop of a diocese, to grant a faculty to the bishop for admitting into Holy Orders a person who otherwise could not be so admitted by reason of subsection (1) of this section.

This Measure had already had a rocky passage through the General Synod, and was approved despite a significant minority in the House of Laity objecting to it. The split of votes in the three Houses were 29 against 5 in the House of Bishops, 139-65 in the House of Clergy and a narrower 125 against 77 votes in the House of Laity. Controversially, the Senior Members of the General Synod took a decision that an absolute majority was acceptable and that the Measure did not require the support of

two-thirds majority in each House of the Synod (which is usually the case where important issues of doctrine of the Church are being altered or affected).

Apart from the issue on how this Measure was passed in the General Synod, the status of marriage was also discussed in the Ecclesiastical Report and questions raised on way divorce was treated differently for lay worshipers (who could not be married in Church) and Priests wanting to be ordained in the Church of England for whom divorce was not a disadvantage. In the Ecclesiastical Report this was highlighted as an important consideration for this particular Measure as it dealt with divorce among Members of the Clergy. The Ecclesiastical Report pointed to:

> The Lichfield Report in 1978 recommended by a majority that the Church of England should revise its regulations to permit a divorced person with the permission of the bishop to be married in church in the lifetime of a former partner. This recommendation has not been implemented[343].

The Ecclesiastical Report quoted the explanation given by the Legislative Assembly on why the change was being introduced;

The case for the Measure

[343] 1988/89 HL 45. HC 361 Ecclesiastical Committee. 197th report. Report by the Ecclesiastical Committee upon the Clergy (Ordination) Measure

The view of the majority on the General Synod supporting the Measure was summarised in paragraph 9 of the Legislative Committee's comments and explanations in the following terms:

> "They felt, while strongly affirming the sanctity of marriage, that the existing rigid statutory and canonical requirement was unjustified in principle and worked unfairly in practice. They considered that to treat past events, including even those occurring before a potential ordinand first became a Christian, as an invariable bar to the testing of a vocation was an inadequate reflection of Christian understanding of grace and forgiveness. It was further noted that, if a clergyman who is *already in post* as an incumbent or in some other freehold office is divorced, he may remain in that office *whether or not* he remarries. Accordingly there was support for an approach directed not towards the removal of barriers entirely, but to the giving of a discretion for a dispensation from the present total prohibition[344]."

Response of the Ecclesiastical Committee

This was going to a very close vote in the Ecclesiastical Committee and it was inevitable due to the controversial subject matter that a joint session would be called with the Legislative Committee of the General Synod. This took place on the 18th of April 1988.

The House of Lords representatives on the Committee present in this meeting were:

[344] *Ibid*., Para 4. p 3.

Lord Fletcher, Lord Robertson of Oakbridge, Lady Saltoun of Abernethy, Lord Sandford, LordTerrington, Earl Waldegrave, Lord Westbury, Lord Williams of Elvel and Lord Beaumont of Whitely.

The representatives from the House of Commons were:

Mr Michael Alison, Mr Frank Field, Mr John Selwyn Gummer, Mr Peter Hardy, Mr Michael Latham Mr William Powell and Mr Roger Sims.

The representatives from the Church were:
The Bishop of Guildford, Chairman of the Steering Committee in charge of the Measure; Mrs Penny Grainger, Member of the Steering Committee in charge of the Measure; Mr Derek Pattinson, Secretary-General of the General Synod; Lady Johnston, Standing Counsel to the General Synod; and Mr B J T Hanson, Legal Adviser to the General Synod.

Mr Michael Alison began by asking the Bishop of Guildford why,

> "...a matter of fundamental doctrinal importance is being proposed here and that, whatever the legal technicalities over which sub-clause of the Worship and Doctrine Measure was appropriate, this matter should be seen as a matter of natural law (if l can use that term in the synodical sense of the law of the Synod). It is suggested that it would be a matter of natural law that this kind of

issue should be determined by a very substantial majority-they would say a two-thirds majority. It is also suggested that it is merely a technicality to say that it does not fall under the Worship and Doctrine Measure, because the Synod is introducing a new Measure which breaks new ground and with that Measure it can do what it wants[345].

Brian Hanson, the Legal Adviser to the General Synod pointed out that this Measure was not considered to fall under the remit of Article 7 or Article 8 of the Schedule 2 of the Constitution of the Synod, under the Synodical Government Measure which would have required a two third majority to support a Measure.

A second joint meeting on the 13th of February 1989 of the two Committees took place and the seriousness with which the Church of England was taking this matter can be seen by the fact that the Archbishops of Canterbury and York were both present in this meeting. In a protracted debate on the Church's views on marriage and divorce and concerns were expressed on a simple majority being accepted in the Synod vote. The Archbishop questioned the Members of the Ecclesiastical Committee on what they interpreted 'expedient' to mean, it did not mean it was a decision taken by members of the Ecclesiastical Committee based on their own views on whether they approved of a Measure. The Archbishop pointed out that he,

"...always assumed that you might disapprove of a Measure but that you would think it expedient it should go forward because it had been properly argued,

[345] *Ibid*., Para 6, p 16.

> thoroughly investigated, was the general will of the Synod and, therefore, was expedient to go forward...[346]"

This was an interesting point, as 'personal' beliefs and faith was central to many of the arguments put forward by Members when Parliament rejected the Appointment of Bishops Measure in 1984. Many of the Members were from the Ecclesiastical Committee that had narrowly passed that Measure. The questioning of the Church representatives in the two joint meetings with the Ecclesiastical Committee did seem driven by personal belief and faith of the Member of the Committee, rather than constitutional concerns of all Her Majesty's subjects.

Despite serious objections to this decision (to allow an absolute majority) being made at the Ecclesiastical Committee stage, the Measure was found to be expedient (10 votes to 9, with the Second Church Commissioner abstaining) and was presented to the House of Commons.

Debate in Parliament

The debate began at 2.06 am and was introduced by Michael Alison, the Second Church Commissioner who opened the debate by remarking that:

> This is one of those occasions when the House is called upon to manifest the characteristics of a monastic order, rising to attend to spiritual exercises in the small hours. I congratulate the many colleagues here who have risen to the

[346] *Ibid.*, Para 16, p 35.

> occasion. I am quite certain that they will receive a reward, although from a loftier source than the Patronage Secretary and the Whips[347].

Despite the lateness of the hour, there were enough Members of the House of Commons who had stayed on in the Chamber to comment on how this Measure would severely undermine marriage. This led George Howarth to comment that

> We heard the authentic voice of 19th century England as it survives into the 20th century--that of the hon. Member for Halesowen and Stourbridge (Sir J. Stokes). His view typified the undercurrent of feeling among Tory Members which made me feel that it was necessary to intervene--that the Church of England is all about cream teas on the village green, and tut- tutting about goings on[348].

There were Members such as Jo Richardson who felt it was not the place of the House of Commons to thwart the desires of the Church. She felt,

> I do not believe that it should be the role of this Parliament--the Parliament of the people--however deeply some individuals may feel about the issue, to overturn the expressed view of the parliament of the Church of England. It is true that we are not disestablished, and I am not in any sense arguing for disestablishment, but our role is to consider the Measure. However, I believe that, once the Synod has come to a conclusion, both Houses of Parliament--the House of Lords and the House of Commons-- should acquiesce in that decision and let it pass. We would be wrong to use our superior powers--superior in the

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[347] *HC Deb 17 July 1989 vol 157 c174*

[348] *Ibid.*, c 190.

> sense that we have the power to destroy this Measure--and to use our heavy hand to frustrate the Measure[349].

The view of Mr. Hughes on this was that it was appropriate for Parliament to be looking at such Measure, passed by a majority in their own legislature,

> We must decide whether the proposal is right according to theology, morals or ethics. We must also consider whether Members of Parliament have a right to intervene in this matter. For as long as Parliament has the responsibility to approve matters that are put to us, we can, if we wish, disagree with the Church. I take that view even though I believe that the Church should be self-governing and should not have to come to Parliament. However, Church matters such as this come to Parliament under the present rules, constitution and practice. Clearly we have the right to say no to the proposal from the Church even though it is an internal Church matter. What is the balance[350]?

There was also unhappiness expressed by Members on how the Measure was drafted and William Powell, who was a Member of the Ecclesiastical Committee, commented that,

> "...this is the worst piece of legislation that has been introduced in the six years that I have been a Member of Parliament. It is so loose and general that it is a legislative disgrace. Even the members of the Ecclesiastical Committee who

[349] *Ibid.*, c 186-187.

[350] *Ibid.*, c 187.

voted with the majority were less than enthusiastic about the quality of the legislation...[351]"

Eventually when the matter was put to vote, the Measure was rejected by 51 votes to 45. The Measure was re-submitted to Parliament after some changes and was approved on the 20 of February 1990 by 228 votes to 106 and became the Clergy (Ordination) Measure 1990.

Comment

In response to this decision by Parliament, Colin Buchanan[352] wrote an article in The Times entitled, *A Church-State Divorce*[353] where he said that the most serious objection to what had happened in Parliament with this Measure was that the Commons had "thwarted the decision of the General Synod" and that the "selection and ordination, of ministers" were "in the grip of a fundamentally non-Christian Parliament" and there did not seem to be any "legal way to escape it or evade it". Buchanan went on to say that Parliament "for all its legal powers, has neither moral nor theological basis for governing the Church of England". For Buchanan, this was simply a case where 51 Members of Parliament "voted out a few people's hopes of ordination". He compared this to the outrage 156 years before where Parliament had re-organised Irish bishoprics

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[351] *Ibid.,* c 191.

[352] Who had recently resigned as Bishop of Aston.

[353] July 19, 1989.

without consulting the then United Church of England and Ireland. This had prompted John Keble to deliver his famous sermon on "National Apostasy". In this article, Buchanan ended by advocating the idea that the Church would be able to fulfil its mission better if it were free from the controls of Parliament[354].

The reference by Buchanan to this sermon in this article was interesting. This sermon by Keble, in 1833 has been referred to by Gareth Bennett in his book *To the Church of England* where Bennett supports the view that this sermon by Keble, marked the beginning of the Oxford Movement. It was seen by Bennett as more than an attack on the then Whig Government. It asked the critical question what made the Church "...different from being part of the English constitution, or a historical museum, or an agency for social welfare or the agitation of moral causes...[355]".

The Measure was about trying to establish a level playing field for all prospective candidates for priesthood (those divorced after being ordained and those divorced before), Buchanan's article does have a point as it seem that in certain quarters of the Church, this was seen as an attempt by Parliament to dictate terms to the Church on who they could employ.

[354] Buchanan has written extensively on this subject and this is the main subject of his book *Cut the Connection* (1994).

[355] Bennett (1988), p 241.

6.5 Priests (Ordination of Women) and the Ordination of Women (Financial Provisions) Measure 1993

This significant piece of legislation[356] was probably the most controversial in the modern history of the Church of England. The General Synod passed this Measure after a protracted debate. There is one aspect of the Measure which will be examined for this Measure. This will not be a detailed examination of the Measure and the Ecclesiastical Reports connected to it as was done for the other three Measures in this section.

One of the duties of the Ecclesiastical Committee was to examine the impact of a Measure and look at,

> "the nature and legal effect of the measure and its views as to the expediency thereof, especially with relation to the constitutional rights of all Her Majesty's subjects" (section 3(3) of the 1919 Act).

During the debate in the Ecclesiastical Committee, this aspect of the 1919 Act was used in an unusual way by the opponents of this Measure to argue that it was their duty to also look after the interest of the minority (who were Her Majesty's subject as well).

The point was first raised by Frank Field when questioning Professor McClean where he asked the question, that:

[356] 1992/93 HL 116. HC 895 Ecclesiastical Committee 203rd and 204th reports. Reports by the Ecclesiastical Committee upon the Priests (Ordination of Women) Measure and the Ordination of Women (Financial Provisions) Measure.

> You said that our agenda now was to decide whether this Measure was expedient within the terms of the 1919 Act. It is only partly that. Part of our function as parliamentarians is to protect the interests of constituents who may be adversely affected by a Measure. Therefore, we are quite rightly, as a Committee, much concerned with, and no doubt will spend much time on, how the position of minorities is protected. I would like, therefore, to take you back to the answer you have just given to Mr Pike and ask you to give us your thoughts further on how the position of those who are now in a minority in the Church will be protected...[357]

A similar question was asked by Patrick Cormack where he asked Professor McClean to read aloud Section 3 (3) of the Enabling Act which talked about the impact a Measure may have on the constitutional rights of an individual. He then went on to ask,

> "...what do you think about the constitutional rights of those of Her Majesty's subjects who were baptised into the Church of England when women priests were not allowed, who had their children baptised into such a church and who wish to be able to look for many generations hence to episcopal oversight within such a church. Do you not think there ought to be statutory safeguards, at the very least an enacted...before we deem such a Measure expedient or otherwise we would be reneging on our duties[358]?

[357] *Ibid*., Para 5, p 64.

[358] *Ibid*., Para 21.

This argument was strongly refuted by Baroness Seear who felt that these arguments were focussing too much on what "affect a minority of people. ..a very large number of women who have waited a very long time for this legislation...I think it would be extremely unbalanced for the discussion to go further...".

This Measure did contain a second Measure which was to deal with this 'minority' objectors from within the Church who were compensated with a financial package to help them overcome any 'hardship'. There were also non-financial provisions made such as those listed below:

Arrangements for those opposed

11. Many safeguards are already provided, either under existing legislation or in the Measure, for those Bishops, beneficed clergy and parishioners who remain opposed to the ordination of women to the priesthood. In particular:

(a) Section 6 of the Measure protects future Bishops who do not wish to ordain, license or institute a woman as a priest from action under the Equal Opportunities legislation;

(b) Under Canon C.8, no minister may exercise his (or her) ministry in any place where he (or she) does not have the cure of souls without the permission of the minister having such cure;

(c) Under section 2 and Schedule 1 to the Measure, parishes can declare through resolutions of the Parochial Church Council that they would not accept a woman exercising a priestly ministry in the parish or as an incumbent, priest-in-charge or a

team vicar. This is in addition to the rights parishes already have in the selection of a new incumbent through the Patronage (Benefices) Measure[359].

It is a destructive and dangerous argument to use the impact on minorities to reject a Church of England Measure. It is inevitable that similar tactics maybe used in the future, maybe when the time comes to discuss the consecration of women Bishops[360]. Already there is evidence that a narrow and less liberal view on what marriage and divorce meant in society was responsible for the defeat of the Ordination of Clergy Measure. It is not insignificant that a similar Measure was passed the following year, only because the House of Commons had a large number of MPs present and voting when the Measure came up for vote. So the social and religious attitudes all got evened out.

There is always the risk that the 'expedient for all' clause may be abused in the future in the Ecclesiastical Committee debates. There is at present no provision for the Church of England to skip the Ecclesiastical Committee and introduce Measures directly to Parliament.

The Ecclesiastical Committee was able to ensure protection from arbitrary dismissal for an elected lay official in the Churchwardens Measure. This was a positive and progressive step which brought the Church in line with other lay employers. However, the contribution of the Ecclesiastical Committee has not always been a modernising and

[359] *Ibid*., Para 11, p 25.

[360] The recent rejection in the General Synod may have delayed the process of having women Bishops in the Church of England. This issue is very likely to return to the General Synod for discussion in the future as it clearly had the support of the Church leadership.

progressive one. It is dependent on the individuals who make up the Committee at any given time and their personal beliefs and politics. If the mix of Committee members is kept sufficiently broad based, there is a lower risk of individual Members bringing their own personal views to bear on whether Measures pass this stage in the legislative process.

6.5 Churchwardens Measure 2001

Why was this Measure introduced?

This Measure began life as far back as 1993 when the General Synod appointed a working party to look at how an unsuitable churchwarden could be suspended or removed by the Church. Before moving to an explanation of the actual Measure, it is important to explain briefly who is a 'Churchwarden'. A good description can be found in Peter Smith's article, *Churchwarden: An Introduction to the Office*[361] where he explains how,

> The office of churchwarden is a very ancient office going back to the fourteenth century, and perhaps even earlier. The office today is in fact an amalgam of a number of offices and duties... even at its inception; the churchwarden was a temporal officer. The office of churchwarden originated as the treasurer of the church who was responsible for holding the parish stock on behalf of the parishioners. They were creatures of the common law which, in the absence of modern notions of the company or the trust, sought to deal with such parish property through the medium of a guardian or warden in much the same way as it dealt with the property of infants who were similarly under a legal incapacity.

[361] Smith (2000).

Their primary responsibility was therefore to the parishioners, and accordingly they were required to account each year to the parish meeting for the goods and funds in their care while in office.

A formal 'job description' of the Churchwarden can be found in Canon E1 paragraphs 4 and 5 as set out in: **THE CHURCHWARDENS MEASURE 2001 – A BRIEF GUIDE.**[362]

Under those paragraphs, once churchwardens take up their office, they:-

(a) Are the officers of the bishop (not the incumbent or PCC) (E1.4);

(b) Must be the foremost in representing the laity and co-operating with the incumbent (E1.4):

(c) Must use their best endeavours by example and precept to encourage the parishioners in the practice of true religion and to promote unity and peace among them (E1.4);

(d) Must discharge the duties assigned to them by law and custom (E1.4). (Examples of this are their duties in relation to the offerings or collections in the church, and the duties imposed on them by section 5 of the Care of Church and Ecclesiastical Jurisdiction Measure 1991 in relation to the church building and the land and articles belonging to it);

[362] http://www.churchofengland.org/media/51419/cwguide.rtf. The Guide has been attached as an appendix at the back of the thesis.

(e) Must maintain order and decency in the church and churchyard, especially during the time of divine service (E1.4); and

(f) Hold the title to the movable goods of the church, must keep an inventory of those goods and keep it up to date, and must hand over the goods to their successors, who must check the inventory (E1.5).

In his Article "Bishops' Wardens" written in 1998, Stephen Trott describes how running a present day parish had become "... a growing burden, as financial demands grow, and as clergy must increasingly be shared among parishes or take on diocesan appointments in addition to their parish duties...Churchwarden and incumbent together face major practical and administrative responsibilities and depend on each other increasingly in shared ministry in the parish...[363]." An unpaid Church official, whose description was "Officers of the Ordinary"[364].

Behrens explains how the "original draft Measure largely followed the recommendations made by a working party appointed by the General Synod in December 1993. The report of the Working Party on Lay Office-holders was published in 1995. This led to a draft Measure, which was first approved by General Synod in July 1997[365]". The background to this Measure is outlined in the Ecclesiastical Committee

[363] Trott (1998).

[364] *Ibid*.

[365] *Ecclesiastical Law Journal*. (2001), 6: 97-101.

Report.[366] As the rest of the Measure was without any controversy, the background Report of the Ecclesiastical Committee focussed on one particular clause in the draft Measure. This was the procedure for removing or suspending a Churchwarden by the Bishop. In December 1993 a working party was set up by the Policy Committee of the General Synod under Chairmanship of Dr. Christina Baxter to review the law relating to churchwardens. The recommendations of the working party (which reported in May 1995) were set out in draft Measure (which was called the Lay Office-Holders Measure initially) and the proposal by the working party was to allow a Bishop the right to remove or to suspend a Churchwarden[367].

These recommendations were partially reversed by the Revision Committee (who was given the responsibility to scrutinise the draft Measure in November 1995). The Revision Committee retained the power of suspension, but removed the right of the

[366] Ecclesiastical Committee 215th Report. HL 41 II. HC 306. 2000/01 HC 306 Report by the Ecclesiastical Committee upon the churchwardens measure

[367] (a) to suspend the churchwarden from exercising the functions of his or her office without the Bishop's permission. Suspension would not mean the churchwarden ceased to hold office and would not give rise to a casual vacancy; it would continue until the next annual meeting of parishioners, unless it had been lifted by the bishop before then, and the bishop would have power to re-impose it for one further year but no longer. After the suspension had ceased to operate, the annual meeting of parishioners would be free to re-elect the churchwarden for further terms of office if it thought fit and if he or she wished to stand again for election; and (b) to remove a churchwarden from office and, if the bishop thought fit, to disqualify him or her for up to five years from holding office as a churchwarden or member of the parochial church council in the parish in question and any other parishes in the diocese which the bishop specified. The exercise of this power would be subject to an appeal to a tribunal consisting of three members of the bishop's council (including two lay people).*Ibid.*, p 19.

Bishop to remove a Churchwarden. It considered the option of giving the suspended Churchwarden the right to appeal, but in the end did not recommend that in its draft proposal[368]. As an additional step to make any process of suspension more open, the Revision Committee recommended guidelines for Bishops on this issue, which would be published by the House of Bishops.

Two separate sessions of the General Synod looked at these proposals in 1996, where once again an attempt was made to amend the draft and add an appeal procedure for a suspended Churchwarden. This attempt not successful. In the 1997 summer session of the Synod, the draft Measure was given its final approval. In the debate at the final approval stage there was a dissident voice to this draft but the overwhelming majority of the Synod was in favour of this draft.

In the section in the Ecclesiastical Committee Report where the Legislative Committee of the General Synod gave its "Comments and Explanations on the Churchwardens Measure", the Committee took great care to explain the process of consultation

[368] The reason put forward by the Legislative Committee in their report to the Ecclesiastical Committee was that the Revision Committee did not feel that "... the power to remove a churchwarden from office was not essential and gave rise to serious complications, particularly the difficulty of devising a satisfactory appeal procedure and that it should be deleted from the Measure. However, the Committee was satisfied that a power to suspend was required. The Committee envisaged that it would be used where the churchwarden had committed or was suspected of serious misconduct, for example where a criminal prosecution was pending...the Committee also decided that the bishop should have power to lift the suspension at any time; that he should have power to renew it for two further terms only; and that as it was essentially a temporary measure, no right of appeal was necessary...". *Ibid.*, p 21.

undertaken by the Committee[369]. Clearly the support for this draft was significant in the Synod and the long period of consultation under two different Committees added weight to this draft as it seemed to reflect the views of the wider Church and not just the Bishops.

Together with the draft Measure, the Ecclesiastical Committee was also sent the draft guidelines for Bishops on how to exercise the power to suspend a Churchwarden. The understanding was that these guidelines would be published once the Measure had been found expedient by the Ecclesiastical Committee. Another reason given by the Church was that the draft guidelines could be altered if there were any suggestions to do so by the Ecclesiastical Committee or by Parliament. These were the facts as they were presented in the Ecclesiastical Committee Report and it all sounded very conciliatory[370].

The Controversial Clause

The Clause to suspend a Churchwarden was as follows:

9.-(1) Subject to subsection (2) below, the bishop may for any cause which appears to him to be good and reasonable suspend a person who holds the office of churchwarden,

[369] Listing how the "...initial consultation process included letters to all diocesan bishops...a number of bodies and organisations which the Working Party had identified as likely to be able to help with its task, in each case inviting information, views and suggestions. The same invitation was extended in items in the Church Press and a Synod Question and Answer. As a result, the Working Party received a very large number of submissions...on behalf of the majority of dioceses; from a number of bodies and organisations; from Synod members; and from other individuals, both clergy and lay. *Ibid.*, p 16.

[370] *Ibid.*

that is to say, prohibit the holder from exercising without the consent of the bishop any right or duty incidental to that office during the current term of that office, after giving that person sufficient opportunity of showing reason to the contrary.

(2) Where a person is suspended under subsection (1) above during a term of office as churchwarden and that person is chosen as a churchwarden of the parish in question or any other parish in the same diocese for the ensuing term of office, the bishop may exercise the power to suspend that person under that subsection for the same cause in respect of the ensuing term of office, but shall not do so in respect of any subsequent term of office: Provided that nothing in this subsection shall affect the power to suspend that person under that subsection for any other cause.

(3) Suspension under subsection (1) above shall not be treated for the purposes of this Measure as giving rise to a casual vacancy in the office of churchwarden, but where a churchwarden is so suspended the bishop shall, as soon as practicable and after consultation with the minister and the parochial church council, appoint a person to perform the duties of the churchwarden during the period of the suspension. Any person so appointed shall, for all purposes in law, be deemed during that period to be a churchwarden of the parish in question.

(4) The bishop may revoke any suspension effected under subsection (1) above.

(5) Any suspension under subsection (1) above shall be effected by notice in writing served on the person concerned by post.

(6) For the purposes of this section a person who has been chosen for the office of churchwarden but has not yet been admitted to that office shall be deemed to hold that office, and the expressions "'office", "churchwarden" and "term" shall be construed accordingly.

Explanation of clause 9 by the Legislative Committee

In the section of explanation sent to the Ecclesiastical Committee by Legislative Committee, emphasised how any suspension of a Churchwarden (or an individual selected as a Churchwarden, but not yet admitted to office) would only happen in a situation where the cause "...appears to the bishop to be good and reasonable, but only after giving the person concerned sufficient opportunity of showing reason to the contrary...". The suspension was not permanent and the Bishop has the power to revoke the suspension at any time. It also clarified how "...if a person who has been suspended is chosen again as churchwarden for the following year by the same parish or any other parish in the diocese, the bishop may suspend him or her again for the same reason for one more term of office but no more. Any further suspension will only be possible if it is for a different reason...". Finally, the Legislative Committee explained how the suspension did not create a casual vacancy in the office of Churchwarden and that suspended Churchwarden was to be "...treated as if he or she was the churchwarden for the purposes of any legal rules..." any subsequent appointment is to be made "after consultation with the minister and the parochial church council"[371].

[371] *Ibid.*, p 26.

Response of the Ecclesiastical Committee

As deliberations of the Ecclesiastical Committee are in private, one can only assume that enough Members of the Committee were unhappy with the draft Measure and representatives of the General Synod were invited before the Ecclesiastical Committee to clarify some of the issues called which was a cause for concern for some Members. This meeting took place on the 15th of December 1998. This meeting was attended by twelve members of the Ecclesiastical Committee from the House of Lords:

Viscount Brentford, Lord Brightman, Viscount Caldecote, Lord Hardy of Wath,
Lord Pilkington of Oxenford, Lord Robertson of Oakridge, Lord Strabolgi, Lord Templeman (Chairman), Lord Teviot, Lord Westbury, Baroness Wilcox and Lord WilIiams of Elvel.

From the House of Commons, the twelve members were:
Mr Nigel Beard ,Mr Martin Bell, Mr Stuart Bell, Mr Peter Bottomley, Mr Ben Bradshaw, Sir Sydney Chapman , Sir Patrick Cormack, Mr David Drew, Mrs Gwyneth Dunwoody, Mr Simon Hughes, Mr Gordon Marsden and Mr Peter L. Pike.

The representatives from the General Synod were:
The Rt Rev Ian Cundy, the Bishop of Peterborough, Rev. Stephen Trott (who had spoken against this draft Measure in the final stages of approval by the General Synod),

Dr. Christina Baxter (Chairman of the House of Laity), Philip Mawer (Secretary General, The General Synod) and Ingrid Slaughter (Assistant Legal Adviser, The General Synod).

During the meeting, Lord Williams asked how the code of practice for the Bishops on suspension was meant to operate. The response from the Bishop of Peterborough was that the:

"...suspension would only be used on rare occasions, either when an accusation was laid against a churchwarden which, if known at the time of his or her election, might well have disqualified them as a candidate for election, if they were guilty of fraud or disqualified under the Charities Act and so on, or where his or her conduct seriously affected their suitability to perform the duties of a churchwarden...[372]".

The concern of Mr. Pike was that the provisions in the draft Measure seemed

> "...too draconian and when suspension takes place what right of appeal has the churchwarden who is elected? It is a very old office, as, has been repeatedly put to us, in the church. What right of appeal and procedure does that person have to get a decision looked at again and perhaps reversed?...[373]"

In the opinion of Stephen Trott, the option of using judicial review to challenge suspension was not really an option because the legal advice he had been given was that:

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[372] *Ibid.*, Para. 3, p 31.

[373] *Ibid.*, Para. 5, p 32.

> "...the effects of clause 9 of the Measure do not amount to suspension but, in fact, to removal from office. The churchwarden is not a lifetime office, it is an office for just 12 months at the maximum and the bishop will be able to suspend for up to two 12- month periods. Whether we say that the churchwarden is suspended or removed, the effect is the same. He is no longer acting as churchwarden, and it seems to me that if we are talking about removal from office, whether in name or in fact, there does need to be a right of appeal against such a decision...[374]"

A different interpretation to the Judicial Review route to challenge the use of Clause 9 by a Bishop was offered by Ingrid Slaughter who admitted that:

> I think it is fair to say that the one thing which was not really discussed in the Synod at all was the possibility of the bishop acting in an entirely arbitrary and unsatisfactory way in the sense that, for example, he might suspend a churchwarden (as the example was given) because he might approve or disapprove of the ministry of women in the priesthood. I do not think the Synod actually considered that to any great extent...but in any event I think it was felt, and I myself take the view, that judicial review would be available in those circumstances[375].

The response of Patrick Cormack to the question of using Judicial Review as an option was that it was very expensive and this was really "an unsatisfactory state of affairs"

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[374] *Ibid.*, Para. 11, p 33.

[375] *Ibid*., Para. 13, p 33.

and that the suspension Clause violated natural justice and "..the word "reasonable" is not one that sits happily in this context and that we are giving wide-ranging powers so that a man ...and have no proper appeal...[376]."

It seemed evident from some of the comments from Members of the Ecclesiastical Committee that many had deep doubts over this draft Measure and this may have been compounded by the admission by Stephen Trott that, he did not

> "...believe that the Synod is actually infallible, although I am a member of it and I take my part in voting within it, but the Synod has on an earlier occasion passed the Vacation of Benefices Measure in 1977, which provided a quasi disciplinary scheme which has only been used once and proved to be unworkable, and I am anxious that on this occasion we should spare the church that kind of embarrassment of creating a power for itself which proves to be difficult and unworkable....[377]".

As this meeting had proved to be unsatisfactory for some Members of the Ecclesiastical Committee (again one can only speculate, as the meetings are held behind closed doors), under section 3(2) of the 1919 Act a joint meeting of the Ecclesiastical Committee and the

Legislative Committee of the Synod could be called to iron out any differences, and this was done in May 1999. This time the representatives from the Church were:

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[376] *Ibid*., Para. 15, p 33.

[377] *Ibid*., Para. 17, p 34.

The Archbishop of York (Chairman), Mr Philip Mawer (Secretary-General), Mr Brian Hanson(Legal Adviser), The Bishop of Durham, Canon John A Stanley, The Rev Stephen Trott , Mr John Pakenham-Walsh QC (Standing Counsel), The Rev Jonathan Young, Dr Christina Baxter , Miss Ingrid Slaughter (Assistant Legal Adviser), Dr Philip Giddings, Professor David McClean, Mr David Wright and Mr lan Garden.

The Archbishop presented an amended Clause 9 to the Committee which had more specific grounds for suspension[378]. These changes were questioned by Lord Pilkington as not going far enough. Despite the endorsement of Rev Stephen Trott that,

> "...the Measure has been substantially improved by the provision of an appeal procedure on appeal to the Dean of the Arches, and also with a provision that if a replacement churchwarden is to be brought in, it should be somebody brought in on the initiative of the parish rather than on the initiative of the bishop...".

Following the joint conference in May 1999 and the concerns expressed by Members of the Ecclesiastical Committee, the Legislative Committee withdrew the Measure in June 1999. The matter was considered again by the General Synod and the Legislative Committee again and a new clause 9 was constructed and presented to the Ecclesiastical Committee.

The new Clause 9 presented to the Ecclesiastical Committee

[378] *Ibid.*, p, 50.

New Clauses 9, 10 and 11 in place of original Clause 9, were approved by the General Synod in 2000.

Suspension: General.

9.-(1) Subject to subsection (4) below, the bishop may, on any of the grounds specified in subsection (2) below, suspend a person who holds the office of churchwarden; that is to say, preclude the holder from exercising without the consent of the bishop any right or duty incidental to that office during the current term of that office, after giving that person sufficient opportunity of showing reason to the contrary.

(2) The grounds on which a person may be suspended are as follows (a) that that person has requested or consented to the suspension;

(b) That that person is unable to carry out the duties of churchwarden by reason of absence, illness or other incapacity;

(c) That that person has been charged with any offence which is punishable with imprisonment Of, if not so punishable, would on conviction disqualify that person from being chosen for the office of churchwarden by virtue of section 2(1) of (2) above;

(d) That that person has been convicted of any offence which is punishable with imprisonment.

(3) Before suspending a person under subsection (1) above on the grounds specified in subsection (2)(c) or (d) the bishop shall consult the minister (if any) and the parochial church council, and he shall also do so in the case of a suspension on the grounds specified in subsection (2)(b) if the person concerned so requests.

(4) Where a person is suspended under subsection (1) above during a term of office as

churchwarden and that person is chosen as a churchwarden of the parish in question or any other parish in the same diocese for the ensuing term of office, the bishop may exercise the power to suspend that person under that subsection on the same grounds in respect of the ensuing term of office, but shall not do so in respect of any subsequent term of office: Provided that nothing in this subsection shall affect the power to suspend that person under that subsection on any other grounds.

(5) Suspension under subsection (1) above shall not be treated for the purposes of this Measure as giving rise to a casual vacancy in the office of churchwarden, but where a churchwarden is so suspended the bishop shall, if the minister and the parochial church council acting jointly so request and after consultation with them as to the person to be appointed, appoint a person who is qualified to be a churchwarden of the parish in question to perform the duties of the churchwarden during the period of the suspension. Any person so appointed shall, for all purposes in law, be deemed during that period to be a churchwarden of the parish in question.

(6) During any period when there is no minister subsection (5) above shall apply with the substitution of the words "the parochial church council so requests and after consultation with it" for the words from "the minister" to "them".

(7) The bishop shall revoke any suspension effected under subsection (1) above if he considers that suspension is no longer justified.

(8) Any suspension under subsection (1) above shall be effected by notice in writing

served on the person concerned by post, and the notice shall include a statement explaining the reasons for the suspension and notifying that person that an appeal may be lodged with the Dean of the Arches and Auditor under section 11 below within twenty-one days from the date on which he receives the notice.

(9) For the purposes of this section a person who has been chosen for the office of churchwarden but has not yet been admitted to that office shall be deemed to hold that Office, and the expressions "office", "churchwarden" and "term" shall be construed accordingly.

This was still not acceptable to the Ecclesiastical Committee as indicated by a letter written in March 2000 by Clerk of the Ecclesiastical Committee to the Secretary-General that:

> Although they did not formally find the Measure inexpedient, leaving it to the Synod to approach them... I think it right to indicate that they would be most unlikely to do so. The principal objection was to clause 9(2)(c), which the Committee considered could not be cured by altering the draft Code of Practice from the House of Bishops. There was also objection to clause 9(5), on the grounds that if an elected Churchwarden was suspended any person appointed to perform his functions during the suspension should also be elected[379].

It was at this point, on the 10th of May 2000 that the Legislative Assembly made this statement:

[379] Quoted in Behren (2001), p 98.

The Legislative Committee of the Church of England has today unanimously decided to withdraw the Churchwardens Measure from the Ecclesiastical Committee of Parliament in order to resubmit the measure to General Synod in its July sessions in York with the recommendation that it be amended so that the power to suspend a churchwarden would be withdrawn.

In reaching this conclusion, the Legislative Committee had in mind the desirability of uncontroversial provisions in the Measure (which considerably strengthen the office of churchwarden) completing their passage through Parliament as soon as possible. Eventually, the Synod removed all the clauses to which members of the Ecclesiastical Committee had raised objections and the Measure was deemed expedient in October 2000.

Debate in Parliament

The debate in the House of Commons on this Measure was not a protracted affair[380]. When introducing this Measure, the Second Church Estate Commissioner, Stuart Bell said that he could:

> "...assure the House that although concerns were expressed about a provision that was previously included in the Measure—I shall say more about that in a

[380] *HC Deb 20 March 2001 vol 365 cc306-15*

> moment—it has now been deleted and the Ecclesiastical Committee has reported that the Measure is expedient in its present form...[381]"

Stuart Bell who was a Member of the Ecclesiastical Committee who had been involved in this long negotiation with the Legislative Committee of the General Synod; over the draft clause of the Measure which would have allowed the Bishop of a parish, to suspend a Churchwarden with very little legal means of redress for that lay Church official to challenge the decision by the Bishop, pointed out that,

> "...the overwhelming feeling in the Committee and among parishioners was that giving an unelected bishop power over an elected churchwarden would not be successful...[382]"

Another Member of the Ecclesiastical Committee, Simon Hughes point out that

> This Measure is the most controversial one that the Ecclesiastical Committee has considered perhaps in the 18 years in which I have been a hon. Member, but certainly in all the time that I have been a member of the Committee...we went through all those procedures on the Churchwardens Measure, but we still could agree on it[383].

The Measure was passed in the Lords ten days later[384], the Bishop of Guildford pointed out that the Clause to suspend a Churchwarden which was there in the original draft

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[381] *Ibid.*, c 306.

[382] *Ibid.*, c 307.

[383] *Ibid.*, c 311.

[384] *HL Deb 30 March 2001 vol 624 cc 540-3*

Measure would have been valued by Bishops in the "very rare instances it might have been useful in protecting both parishes and parish clergy".

In the House of Commons debate on this Measure, Simon Hughes made a very important point about the role that Parliament (and the Ecclesiastical Committee by default) played in ensuring natural justice and fairness was available to all individuals, irrespective of who their 'employer', and the Church of England was not exempt from this responsibility of fulfilling the same obligations as others in society. Simon Hughes pointed out that,

> "...for as long as the United Kingdom constitution requires Parliament to have a say in Church of England matters—how long that arrangement should continue is a different debate—we have above all one job to do: to ensure that the normal principles of justice and fair treatment that apply in civic society apply also within the Church...[385]".

[385] *HC Deb 20 March 2001 vol 365* c 312

PART III COMMENT AND ANALYSIS

CHAPTER 7. CHANGING TIMES

The debate about the procedures through which the Establishment operates are located within much broader questions about the role of the Church in modern Britain and how it can re-invent itself to remain relevant. Does the legal structure of Establishment help or hinder that process? Our discussion of our case studies shows that the making of ecclesiastical law operates in rather arbitrary ways. In some cases these procedures can help the Church get a better feel for broader public opinion, in other cases the legal procedures can assist small groups to block or push through laws affecting the Church. In the latter case, the specific way in which Establishment has evolved does not necessarily help the Church in establishing strong roots in broader society. There is however a very important element that this legislative process and the scrutiny by the Ecclesiastical Committee gives the Church, an openness and transparency which makes strengthens its position as the established Church in England.

7.1 The Church in disarray?

Winston Churchill is said to have responded to a clergyman who asked why he did not regularly worship in Church by saying that while the clergyman was like a pillar supporting the Church from the inside, he himself was the flying buttress, supporting it from outside. The question for the Church today is whether support from outside is adequate to keep the edifice intact if the Church does not have enough support from within. With serious divisions within the Church of England on issues such as the

granting of equal status to same sex-marriages, the ordination of gay Clergy and the appointment of women Bishops in the near future, there is a risk that the stability and future of the Church of England may be under threat.

It has to be acknowledged that it is unlikely in the current political and economic climate for any political party to give the constitutional arrangements for the Church of England a high priority in its legislative agenda. In fact, looking at the highs and lows of the debate on Establishment in the Houses of Parliament, it appears as if intense debates on this subject only happen when controversial Bills or Measures from the Church of England are tabled for discussion at Westminster. The next major controversial Measure that is likely to appear in the next few years will be responding to the debate within the Church on the issue of ordaining women Bishops. If and when that becomes an issue, the Establishment of the Church of England will again take centre-stage in Parliament as Parliament will have to decide to accept or reject the Measure that emerges from the Synod.

The Church should perhaps take heed of a suggestion made by Bob Morris in his recent article on The Future of 'High' Establishment in the *Ecclesiastical Law Journal*:

> "... rather than wait passively on events that themselves may – carelessly – force uncomfortable outcomes, it would be better for the Church of England itself to

> consider its future policy and practice as a national church, should it wish to retain that role...[386]"

Clearly the groundwork has to be done by the Church of England if it wants to come out of any future restructuring of State and Church relations with some of its historical legacy intact. Reading the 1916 *Church and State* Report, it is clear that the initiative for change (leading to the 1919 Enabling Act) was the result of the work done by Selborne and his Committee composed of Members of Parliament and Members of the Church of England. We know from Lord Harries that there is a Church commission already deliberating on the next coronation oath[387]. There should perhaps also be a broader Church commission looking once again at the future status of the relationship between Church and State in all its dimensions.

Unlike the changes regarding the appointment of bishops (a change requested by the Church of England for several decades), which were somewhat unexpectedly accepted by Prime Minister Gordon Brown as part of the constitutional reform package formulated by the Labour Party during his term in office, the cutting of Parliamentary links with the Church will not be straightforward. The debates in the House of Lords over the incorporation of the European Convention of Human Rights in 1998 suggest clearly that the Church of England does have its supporters in the Lords. And even with a reduced number of Bishops, the Church of England will have an opportunity to present a strong case in the Upper House if the current composition of the House of

[386] *Ecclesiastical Law Journal* (2011), 13: 260-273.

[387] Lord Harries, King's Law Seminar 2011.

Lords remains largely unchanged. The position in the House of Commons is less clear. The support in the Commons for maintaining the status quo of the current constitutional settlement of Establishment is hard to quantify as there has not been a major debate on this subject since the new Coalition Government came to power in 2010. A lot depends on what "triggers" the next State-Church crisis. This will also determine if it becomes a party political issue rather than a free vote as some Ecclesiastical matters have been in the near past[388].

Following the Enabling Act of 1919, only a handful of Measures such as the 1920s Prayer book Measures, the 1974 Worship and Doctrine Measure, the 1984 Appointment of Bishops Measure, the 1989 Ordination of Clergy Measure, and the 1993 Ordination of Women Measure witnessed heated debates in Parliament and led to the Establishment being questioned by some MPs. Only four Measures of the Church of England have been rejected by Parliament since 1920: the 1927 Prayer Book Measure which was defeated in the House of Commons by 247 to 205 votes, the 1975 Incumbents (Vacation of Benefices) Measure which was defeated by 33 votes to 19, the 1984 Appointment of Bishops Measure was rejected by 32 votes to 17 and finally the 1989 Clergy (Ordination) Measure was defeated by 51 votes to 45 but was passed the following year by 228 votes in favour against 106. Although not a Measure, the Bill to incorporate the European Convention of Human Rights into Law could be added to this list of "failures" of the Church in the past ninety years to get its programme through

[388] The Ordination of Women Priests in 1993 was a free vote, with only 19 Members voting against the Measure in the end.

Parliament[389]. This is an admirable track record for a Church, which has often seen Members of Parliament as "unsympathetic" to its needs. Looking at the record of Measures which *have* been approved by the Houses of Parliament since the 1919 Act, it seems the State has not been a destructive or disruptive partner[390].

Historically, like any broad-based, large organisation, the Church of England has had to deal with divisions, discussion and debate from within and the occasional "turbulent priest" like Henson. In times of conflict and internal strife, a possible strategy for the Church may be to try and use the banner of Disestablishment as a rallying call to unite all the faithful behind the Church leadership. This would only work if it was broadly perceived within the Church that Parliament was acting in ways that were detrimental to the Church. In the current climate this strategy may not work as the divisions within the Church seem deeply entrenched and links with the State are of little relevance in the ongoing debates within the Church right now.

It is inevitable that Church-State relations will undergo a change in the coming years and decades. The model of Establishment we have today is very different from a century ago. In 1911 Parliament had complete legislative responsibility and control over the Church of England. Any changes or adaptations to the Prayer Book, to Worship or

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[389] The Prayer Book issue was settled in 1965 in favour of giving the Church control over liturgy.

[390] http://www.legislation.gov.uk/ukcm. Since the 1919 Enabling Act, a total of 123 Measures have been approved by Parliament. The first Measure was the Convocations of the Clergy Measure 1920 and the most recent being the Mission and Pastoral Measure 2011.

the Doctrine of the Church had to have Parliamentary approval. The Prime Minister had "unfettered" freedom when making senior Church appointments. The country too was more "Christian" in 1911 than it is today.

William Fittall has summed up the situation as follows:

> As the history of the past two hundred years illustrates, Establishment is not a static concept. It is not so much a single ball of wax as a cord with many threads. The probability is that there will be further evolution, as individual threads become unserviceable or for some other reason require attention. A cutting of the cord would, however, be seen by many in the Church of England not simply as the end of an era but as a sad day for the Christian faith, and indeed for religious faith more generally in this country. The State we're in would no longer be the same[391].

Adrian Hastings' concern with disestablishment is that it would be turning "...one's back rather too emphatically upon a very large chunk of our national religious history..." and very likely "involve an enormous and damaging amount of internally directed legal and administrative activity, much of it cantankerous...[392]". Disestablishment, in this view, would leave the Church "narrowly religious" and the more "privatised the churches became, the less they can provide"[393]. He argues that there is an adequate distance

[391] William Fittall, "Perspectives from within the Church of England" in Morris, R. M. (ed.), *Church and State: Some Reflections on Church Establishment in England*. (2008), p 81.

[392] Hastings (1997), p 41.

[393] Hastings (1997), p 41-42.

between Church and State today and that, "... a weak establishment may well be the best basis for the maintenance of a constructive dualism...[394]".

The view of Hasting and Fittal, that a break between Church and State would not benefit society and may cause more damage is a possibility. The evolution of Establishment is closely linked with the evolution of the Constitution. It has been a gradual process over time and the Church is seen a "national institution" and the link with the State and the role of Parliament is important to maintain the status of the Church as "the Church of England and not simply a Church which happens to be in England".[395]

7.2 One thread at a time? One Act at a time?

Looking ahead, an indication of how any future debate on disestablishing or changing the constitutional settlement of Church and State may pan out can be seen by the arguments and divisions that arose when the last Labour Government talked about abolishing the 1701 Act of Settlement. A lot of the debate happened in the media as the suggestion never reached the stage of becoming a Bill and being debated on the floor of the House. The proposition died a premature death with the calling of the General Elections in 2010.

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[394] *Ibid*.

[395] Turnbull and McFadyen (2012), p 3.

In an ABC Radio debate (*The Religion Report* 9 April 2008[396]) between Adrian Hilton (who was removed as the prospective Conservative Party candidate for Slough for his strong "anti-Catholic" views expressed in an article in the Spectator[397] where he defended the 1701 Act) and Theo Hobson, the Anglican theologian, Hobson suggested that repealing the Act of Settlement would lead to the Disestablishment of the Church of England:

> They are linked, because really the law is about ensuring that the monarch is an Anglican, because at the time there was no possibility of the monarch being a Muslim or a Quaker or anything else really, it was a choice between Anglicanism and Catholicism. And so the law is part of what we call the establishment of the Church of England, and if you got rid of the law of the Act of Settlement, it would of course weaken the position of the established church

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[396] Transcript on - http://www.abc.net.au/rn/religionreport/stories/2008/2211786.htm#

[397] "The price of liberty" 8 November 2003. In the article, Adrian Hilton wrote that after "three centuries, the Protestant monarchy will finally be abolished by the ecumenical/multifaith/secular Parliament that swears allegiance to it, and by a complicit Church of England...that the Act of Settlement must not be repealed, because a Roman Catholic monarchy would destroy this country's religious and civil liberties..." He then went on to suggest that presumably "...a future Roman Catholic monarch would receive the crown from the Pope, and the wheel would have come full circle..." and only when "...religious restrictions are lifted on the Papacy to permit a Protestant succession, then the time will have come to question whether the British sovereign, the Supreme Governor of the Church of England, may be a Roman Catholic or married to one...".

> because the monarch could no longer be supreme governor of the Church of England. So yes, it would be an important step towards disestablishment.

Adrian Hilton's response to this was that the agenda was being pushed by other interests as "...Anglicans being silent, it has been a media perception that the Anglican Church has ceased to exist...". He was critical of the idea that repealing the Act of Settlement was going to be easy and pointed out that it would take up a lot of Parliamentary time:

> Its provisions were forever. If you read it, that is a central statement of the Act. Repeal of it would demand the repeal of nine further Acts, on top of which there are 15 Commonwealth countries that would also have to enact similar legislation. This isn't an overnight thing you can do with a three-line whip very straightforwardly at all. It is profoundly complex, because it's rooted in three centuries of settlement history. As far as ordinary people are concerned, they would be wondering why the government is navel-gazing on the constitution instead of legislating for issues like health and education and welfare[398].

Although it is unlikely to be resurrected by the current Coalition Government in the present economic climate, it is still worth looking at how the cards fell when this matter

[398] The point of Parliamentary time and complexity of the Act was refuted by Theo Hobson who suggested that it was "...just like reform of the House of Lords which doesn't happen because people say it's so complicated. So it's hard to separate the sort of rhetoric of people trying to make it more difficult from the reality of whether it's really so difficult. I don't see why it would be so difficult to get rid of that particular law...". It is an interesting analogy with reform of the House of Lords which has been more than a decade in the making. There is of course the politics (and with that massive party political resources and time) which makes reform of the House of Lords very different from repealing the Act of Settlement so Adrian Hilton is probably right on this point.

was raised by the previous administration. At the start of the new millennium *The Guardian* newspaper launched a campaign for a change in the law, supporting a legal challenge on the grounds that the Act of Settlement clashed with the Human Rights Act. Eight years later the Government led by Gordon Brown made the announcement that it would be looking at the 1701 Act as part of its overall Constitutional reform package. Labour named Chris Bryant as the Member of Parliament responsible for looking at how this historical Law could be changed or amended, together with the then adviser on Constitutional Reforms, Wilf Stevenson.

Geoffrey Robertson QC, the constitutional lawyer who has represented *The Guardian* newspaper in the challenge to the constitutional restrictions of the 1701 Act, welcomed what he called the two small steps towards "a more rational constitution." Robertson pointed to the two major points of discrimination in the 1701 Act of Settlement. The first was,

> "The Act of Settlement determined that the crown shall descend only on Protestant heads and that anyone 'who holds communion with the Church of Rome or marries a Papist' - not to mention a Muslim, Hindu, Jew or Rastafarian - is excluded by force of law."

The second point was that:

> "This arcane and archaic legislation enshrined religious intolerance in the bedrock of the British constitution. In order to hold the office of head of state you must be white Anglo-German Protestant - a descendant of Princess Sophia of Hanover - down the male line on the feudal principle of primogeniture. This

> is in blatant contravention of the Sex Discrimination Act and the Human Rights Act[399]."

It has to be said, that apart from comments from the "usual suspects"[400] in the media and some comments from senior Clergy of the Church of England[401] this was not something that captured the imagination of the general public. This was something that those in favour of repealing the 1701 Act realised from Theo Hobson's comment at the end of the ABC radio debate where he acknowledged that it would

> "...take a concerted effort from MPs lobbying for general constitutional change to do with disestablishment and also perhaps the Church of England as well must see the necessity of changes. So it has to come from a sort of wide cultural

[399] *The Guardian* 25 September 2008. With the rather dramatic title "End of the Anglican crown- 300 year bar to be lifted".

[400] In response to speculation that the Labour Party was looking to reform or repeal the Act of Settlement, Nick Herbert, the then shadow justice secretary, wrote to Jack Straw asking him if he had consulted Buckingham Palace and other Commonwealth nations about proposed changes to the Act of Settlement. In an article in *The Telegraph* he made the accusation that: "The Government are pulling blindly at the wires of the constitution without having a clue about what they might disconnect. You would think they would have something better to do at this time than indulge themselves in another round of constitutional vandalism". *The Telegraph* 20 December 2008.

[401] The Bishop of Winchester, Michael Scott-Joynt did not feel change was necessary to the Act of Settlement, whereas the Bishop of Worcester, Peter Selby felt there would ministers if the future Supreme Governor were a Catholic, as long as he/ she was well advise no problem.

movement rather than just the government proposing these laws and then being passed, it's not going to happen like that...[402]."

The Act of Settlement, which seems like such an anachronism in today's society, was born out of political necessity of the times in which it was promulgated to ensure

> "...a Protestant successor, Parliament had to sweep away considerations of hereditary right not just once but many times over. It passed over more than fifty individuals who were closer as blood relations to Queen Anne but ineligible because of their Catholic faith, in order to arrive at the man who eventually became King in 1714, George Lewis of Hanover, a German with only a smattering of the English language, a plain, middle-aged, un-charismatic man, with no great appeal except the essential one. He was Lutheran, not Catholic...[403]"

According to Colley, the Hanoverian kings were acceptable not because "...of who they were. Nor because of whom their ancestors had been. Parliament had brought them to the throne, and Protestantism kept them there. They were essentially serviceable kings, occupying their office because they catered to the religious bias of the bulk of their subjects...[404]."

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[402] Transcript on - http://www.abc.net.au/rn/religionreport/stories/2008/2211786.htm#

[403] Colley (1992), p 46.

[404]To illustrate this point, Colley quotes an English bishop (writing in 1715) who stated that, "A Protestant country can never have stable times under a Popish Prince any more than a flock of sheep can have quiet when a wolf is their shepherd." *Ibid.*, p 47.

This was a religious bias which Colley describes as an

> "…almost embarrassing consensus in the eighteenth and nineteenth centuries that Parliament was unique, splendid and sovereign, the hard-won prerogative of a free and Protestant people…Parliament was part of the Protestant inheritance, venerated more often than it was cold-bloodedly analyzed. Moreover, within its very limited terms of reference, it worked…[405]."

There can be no doubt that the 1701 legislation was deeply discriminatory; it was designed to be that when it was constructed 300 years ago. Apart from making very uncomfortable reading today, it is not directly affecting any individual who is high up in line for the Throne nor taking away or limiting their "free choice" at this moment. The risk of Acts such as this being hijacked by the Human Rights lobby and brought to centre stage is that it takes away precious Parliamentary time and resources from those aspects of the Church-State settlement that may be in more urgent need for reform. The Act of Settlement is the straw man of the Disestablishment debate. It is very easy to criticise, and seems to contain all the elements within it which make it an interesting subject to dissect for politicians and pundits in the media. It is, however, not necessarily the most significant aspect of Establishment that needs reform from a constitutional point of view.

7.3 Road to Disestablishment?

[405] Colley (1992), pp 50-52.

"I can see that it's by no means the end of the world if the establishment disappears. There is a certain integrity to that.[406]" *Rowan Williams, Archbishop of Canterbury*

There does not seem to be a groundswell of support amongst Members of Parliament to tinker with the constitutional settlement of Church and State. It would seem therefore that the Parliamentary juggernaut is not going to go down the road of Disestablishment on its own volition. It is only likely to do so if pushed and dragged that way by the Church of England. This is aptly reflected in Lord Bassam's comment in a debate in the House of Lords in 2000 that there "...is no great debate about disestablishment. It appears to be something which is very much off the political agenda...[407]." This may still hold largely true in 2011.

It maybe "off the political agenda", it is however wrong to present the issue of Disestablishment as a "dead" Constitutional issue. It does get resurrected periodically due to socio-political and religious events linked to Establishment and the spotlight falls on the "special status" of the Church of England. Recent events such as the civil marriage of Prince Charles, the decision by Gordon Brown to remove the role of the Premier in selecting Bishops, the Archbishop's balancing act as the Church split over homosexuality and women, the discussions on removing the gender and Catholic bias in some of the historical statutes in this country, the reform of the House of Lords and the

[406] Quoted in the New Statesmen in December 2008.

[407] HL Deb 27 July 2000 c 573.

"fate" of the 26 Lords Spiritual have all provoked debates on Establishment in the media and in Parliament.

The main criticisms of Establishment can be grouped under different headings. There are those who critique the Constitutional arrangement of Church and State in England for undermining modern liberal democratic values. These include Haseler whose criticism is that

> This incestuous relationship between spiritual and temporal...not only violates the crucial Western liberal democratic principle that Church and State should be separated, but represents, in theory at least, a fusion not seen outside some of the most theocratic Islamic states[408].

Then there are those, who criticise the system of restricting religious representatives in the House of Lords to just one faith. The Labour politician, Peter Kilfoyle, commenting in 2008, said he felt having 26 Bishops from the Church of England in the House of Lords was giving the wrong signal as:

> "We are a multi-faith community and it doesn't reflect reality to have an established Church which reflects only a small minority...we made a song and dance about hereditary peers, so why not make the same song and dance about primates of one single denomination sitting in the Lords?[409]"

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[408] Haseler (1993), p 69.

[409] *The Telegraph*, 20 December 2008.

Then there are critics of Establishment, who approach this Constitutional Settlement from a "secular" viewpoint. Writing on the British Humanist Association (BHA) website, Naomi Phillips, the BHA Head of Public Affairs, criticized Church of England Bishops "who have taken their reserved seats in our Parliament to speak out and vote *en bloc* against progressive, ethical legislation." She went on to say that, "we know full well – and this will be highlighted many times throughout the meeting of the General Synod this week – that the Church's stance on issues such as gay equality, women's equality and reforming the law on assisted dying is not representative of even its own flock, let alone the rest of society."

She went on to say that

> 'While the Church and its spokesmen have a right to express their views and a right to seek to influence legislation, let them do it equally to the rest of us as another civil society organisation, and not through sitting in our legislature as of right. The continuing conservatism of the Church is one of many important reasons why we should seek actively to abolish the remaining and significant ties between Church and State[410].'

A further argument for Disestablishment is the "numbers game" as the Church of England membership declines and it increasingly looks like any other Christian denomination, rather than the privileged "first among equals" status it seemed to hold for many decades in the last century. In a debate on Disestablishment in the House of Lords on the 27th of July 2000, Lord Dormand of Easington opened the debate by

[410] 10 February 2010. http://www.humanism.org.uk/news/view/482

asking Her Majesty's Government if it would take steps to disestablish the Church of England.

The response from Lord Bassam of Brighton, the Parliamentary Under-Secretary of State at the Home Office was that "**...**the Government would not contemplate disestablishment of the Church of England unless the Church itself wished it...[411]." To which Lord Dormand responded by saying,

> My Lords, that is a very disappointing answer from my noble friend. How can that position be sustained when only 30 per cent of the population are members of the Church of England and only 20 per cent of them attend church regularly? In addition, does he agree that there has been a fundamental change in religious beliefs in this country, in that Catholics, non-conformists, Jews, Sikhs, Muslims, Buddhists and those who have no religious belief at all now constitute a majority? Should they not be given a status equal to that of the Church of England[412]?

Lord Judd expanded on this idea when he stated that "...we have become a multi-cultural society... If we are to be an inclusive, as distinct from an exclusive society, the constitutional challenge that faces us all is how to give the pluralism in our society a greater presence in our political and national institutions...[413]."

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[411] HL Deb 27 July 2000 c 571.

[412] *Ibid*.

Another issue, which often comes up during any discussion on the Establishment of the Church of England, is the "unhealthy" nature of the relationship between Church and State. In a debate[414] in 2002 on "Church and State" in the House of Lords, initiated by Lord Maclennan of Rogart, there was an acknowledgement by him that raising this issue "may seem like the abandonment of common sense" and that the more sensible thing would have been "Quieta non movere...let sleeping dogs lie.[415]" But his reason for initiating this debate was that:

> In the modern world, it is as bad for a Church to be seen as enmeshed in the State as for the State to be seen giving privileged eminence to a Church... The challenge for a modern democracy is to secure the equal treatment of religions by law and the safeguarding of their coexistence in a plural society[416].

Referring to a speech made by the then-Archbishop of Canterbury George Carey on St. George's Day, where he had described Establishment as "the interweaving of Crown and State and Nation [which] have come down to us through the long and steadily

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[413] *Ibid*,, c572. This suggestion was endorsed by Lord Bassam who felt that: "We must encourage a much more inclusive society and find ways in which all sections of our different multi-faith and multi-ethnic communities can be represented in all our national institutions".

[414] Under the "move for papers" procedure. This is a time bound "neutral" debate will allows the Members of the House of Lords to express their views on a subject raised by one of its own Members without the division for a vote at the end of it.

[415] HL Deb 22 May 2002 c 770

[416] *Ibid.*, cc 770-771.

evolving set of relationships known as the Establishment.", Lord Maclennan presented a counter-argument to this and suggested that:

> It is that historical "interweaving" called "establishment" which has drawn out for so long the process of entrenching toleration in our society, which has unduly protracted the removal of disability on the grounds of religion. Above all, it is the fact of establishment, which has held back the espousal of free and equal citizenship as the foundation of our democracy[417].

Keeping with the "weaving" theme, the Bishop of Durham's view was that:

> "... the Church is part of a constitutional weave which includes the monarchy, Parliament, the law, and faith. The noble Lord, Lord Maclennan, asked what it is that we fear. For my part, a quick answer is that I fear the law being left to the lawyers alone, politics being left to the politicians alone, and religion being left to the bishops alone. We need each other in that weave of the constitutional understanding of the nation...[418]".

And finally, there are the critics within the Church, who find this relationship with the State stifling and a restriction on the true "calling" of the Church of England. One of the long standing critics of Establishment has been the former Bishop of Woolwich, Colin Buchanan[419] whose 1994 book *Cut the Connection: Disestablishment and the Church of*

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[417] *Ibid.*, cc 771-772.

[418] *Ibid.*, c 779.

England goes through these arguments. He is supported by many of the evangelicals in the Church of England who want to end the relationship between Church and State. The crux of his argument is that the Church is "tainted" by its association with the State, which has different principles and aspirations from those of the Church.

7.4 Free to select its leaders

Even though Constitutional reforms under the Labour Party appeared to be the norm, the "unilateral decision[420]" by Gordon Brown to change the appointment process of Bishops of the Church of England was the only change that occurred in State-Church relationships. The commitment of the State to Establishment was reiterated by Brown in his statement on Constitutional Reform on the 3rd of July 2007. Brown set out his intentions by saying that:

> The Church of England is, and should remain, the established church in England. Establishment does not, however, justify the Prime Minister influencing senior church appointments, including bishops.

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[419] A very persuasive speaker whom I met during Synod week prior to starting work on my dissertation. He kindly gifted me a copy of his book. His final comment to me as I was leaving was to try and imagine the outrage I would feel if the British had stayed in India as they thought we could not be "trusted" to take care of our own business. The Bishop felt that many of the senior Clergy in the Church of England were happy to be "colonised" by the State and did not mind the chain that came with it.

[420] Morris (2011). *Ecclesiastical Law Journal* (2011), 13: 206-273.

With what seemed to be very little debate and discussion, Gordon Brown changed the process, by removing the "State" out of making appointments of Senior Clergy for the Church of England. This was in fact a significant constitutional change. The role of the Prime Minister in the appointment process - even if in practice, a mere formality - was an important aspect of Establishment, as appointments were made in the name of the Crown, and all matters exercised in the name of the Crown had to be on the advice of the Prime Minister.

Gordon Brown's predecessors had used their influence in the past to select candidates whose name was supposedly not first on the list as forwarded by the Crown Appointments Commission. Brown avoided the debate over whether Margaret Thatcher's[421] or Tony Blair's'[422] exercise of "choice" was the right one and decided instead to cut the link entirely. Brown removed himself and future Premiers from having any control or influence over senior Church appointments.

This may return to haunt future Prime Ministers as the Church is deeply divided on issues such as having women Bishop and on homosexuality. Without any direct or

[421] Bogdanor lists Thatcher's use of "choice" in making senior Church appointment. He lists how Thatcher appointed Graham Leonard rather than John Hapgood as Bishop of London in 1981, then bypassed Mark Santer to appoint Jim Thompson as Bishop of Birmingham in 1987, and preferred George Carey over John Habgood as Archbishop of Canterbury in 1990. Bogdanor (1995), p 228.

[422] In 1997, Blair supposedly rejected both names on the list for Bishop of Liverpool: an unprecedented step for any British Premier in the 20 years since the Crown Appointment Commission had been set up and which led to the Church of England constituting a Committee to look at Church appointment.

indirect influence on who is selected as Bishop[423], future appointments are now likely to depend only on whichever faction of the Church is in the ascendancy at a particular time.

In a brief debate in 1971 on disestablishing the Church of England, the status quo was defended by Lord Aberdare, the then-Minister of State of Health and Social Security on the grounds that:

> State and Church are linked in an intricate body of law much of which is centuries old and some of which originated in pre-Reformation days. Disestablishment requires detailed study in depth and cannot be decided by a series of quick decisions on separate issues[424].

The change in the appointment process for Bishops seems to be an example of what Aberdare was suggesting should not be done- a "quick" decision taken on an issue, which was "separated" from the wider context of having an Established Church. The risk of making hurried decisions in this complex Constitutional arrangement is that it would make it virtually impossible to repair and retrieve any damage, a point made by T S Eliot when he said that we

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[423] Until Bishops are abolished from the House of Lords, any new appointment can potentially become a Member of Parliament.

[424] HL Deb 20 January 1971 vol 314 c 498.

> "...must pause to reflect that a Church, once disestablished, cannot easily be re-established, and that the very act of disestablishment separates it more definitely and irrevocably from the life of the nation than if it had never been established...[425]".

7.5 Postscript on repealing the Act of Settlement

There was a brief discussion in 2011 in the House of Lords on the 1701 Act of Settlement in response to a question tabled by Lord Dubbs. The ensuing debate was brief but had all the characteristics of a scene from an English pantomime. All the main characters in the debate were present in the room with each character having a few lines to contribute to an argument that seemed to continue even as the curtain came down. It looked like a part of a political drama that had been played out before. And this was not the end of the show. This make-shift set was likely to be resurrected again sometime in the future and the arguments repeated with different characters saying the same lines. The important elements of the debate were as follows:

On the 10th of January 2011, Lord Dubbs asked the minister in charge

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[425] T S Eliot The Idea of a Christian Society (p. 49), quoted in Thompson (1970) p 198

"...whether they have any proposals to amend the Act of Settlement to afford equal rights to the Throne for daughters of the Sovereign and Roman Catholics"

To which The Minister of State, Ministry of Justice (Lord McNally) replied

"My Lords, the Government do not have any plans to amend the Act of Settlement".

In response to this Lord Dubbs made the following statement:

My Lords, does the Minister agree that, as a country, we oppose discrimination on grounds of gender or religion? It is curious, to say the least, that we allow such discrimination to continue in the succession to the Throne. Does he also agree that, given that there is a bar on Roman Catholics, it is odd that there is no bar against Jews, Muslims, Hindus or even atheists? Does he further agree that the matter is of some urgency? If His Royal Highness Prince William and his bride have children, it would be invidious to change the arrangements then. The time to do it is surely now.

Lord McNally's reply was that he agreed with a lot of what Lord Dubbs had said but as the previous Labour Administration had recognised, they were dealing with an Act

"...that governs not only us but a number of countries where the Queen is Head of State. For that reason, we have been proceeding with extreme caution... ".

The next speaker, on this 'political stage', was the Bishop of Manchester who asked whether the Minister accepted that:

> "...the central provision for the establishment of the Church of England is that the Sovereign, as Supreme Governor, should join in communion with that church? Does the Minister agree that, unless the Roman Catholic Church is prepared to soften its rules on its members' involvement with the Church of England, whose orders it regards as null and void, it is hard to see how the Act of Settlement can be changed without paving the way for disestablishment, which, though it might be welcome to some, would be of great concern to many and not just to Anglicans or, indeed, to other Christians?... ".

At which point, Lord Forsyth raised the fate of a Bill which he had introduced 10 years ago, stating that,

> I introduced a Private Member's Bill that was torpedoed very effectively by my noble friend Lord St John of Fawsley and which sought to prevent the heir to the Throne marrying a Roman Catholic. The then Government used exactly the same argument, saying that it required countries in which the Queen is Head of State to pass legislation and that they would take the matter forward. It is more than 10 years since that commitment was made. What progress was made and what was done?

The response of Lord McNally to this intervention by Lord Forsyth was a very confusing one: "...I welcome the noble Lord down from his mountain in Antarctica. Messages from the mountain top are always welcome... ". He then went on to say

> We are talking about an Act that is 300 years old and that has served this country not too badly when one considers the 60 years of religious and communal strife that went before it. Therefore, although 10 years seems a long time, there have been consultations. I thought that, at least in this House, talking of progress in terms of centuries would be much appreciated. As is known, the previous Administration initiated discussions among Commonwealth countries. Those discussions are proceeding under the chairmanship of the New Zealand Government and we will continue to keep the matter under consideration.

On the question by Lord Richard on whether Lord McNally could tell the House "...when the last meeting of those countries was and when the next meeting is going to be, and perhaps give us a gentle glimpse of the agenda?...". The retort from Lord McNally was that it never ceased to amaze him the "...penetrating way in which the Opposition demand action this day on matters it sat on for 13 years...the discussions I referred to have not ended; they are ongoing. I shall consult the New Zealand Government, and if they are in a position to let me have that information I shall write to the noble Lord... ".

The final intervention on this discussion was from Lord St John of Fawsley who broadened the debate and asked for,

> "...an assurance from the Government that they have no intention of excluding or reducing the representation in this House of the Bishops of the Church of England, because it is the national church of the country and that would send entirely the wrong signal from this House... ".

Pointing out that this was a subject that should be discussed another day, Lord McNally returned to the subject of repealing the 1701 Act of settlement and said that he would

> ...settle on the statement made by Cardinal Cormac Murphy-O'Connor, who said that the Act of Settlement was, "discriminatory. I think it will disappear, but I don't want to cause a great fuss" .

The contribution by Lord Elystan-Morgan to this debate was to bring in the ambiguities and uncertainties of this historical statute. And of Lord Reid of Cardowan who stated that he "...was born and baptised a Roman Catholic...", and he found the 1701 Act of Settlement

> "...not only an offensive but an anachronistic symbol of division, discrimination and inequality in an age when we are trying to inculcate the opposite in every other aspect of society... "

He went on to ask the Minister to "... make his advice known privately through the Privy Council and government channels that this set of values is incompatible with

modern Britain... ". The discussion ended with Lord McNally acknowledging that he agreed with the views of Lord Reid, but he pointed out

> "...that some of these matters perhaps cause greater problems in Scotland than elsewhere. I have said, and I think that it is accepted, that there are discussions with the Commonwealth countries. We are conscious that there are anachronisms in the Act, but we still advise the House of the wisdom of proceeding with caution... ".

This debate provides an interesting snapshot of how a future debate on changing the relationship between Church and State may proceed in Parliament. Even if there may not be an actual 'voice of the Church' in the form of a Bishop of the Church of England present and none in the House of Commons (despite recent legislative changes removing the disqualification of members of the Clergy from sitting in the House of Commons). The Church of England will have its sympathisers both in the House of Lords and the House of Commons to advocate their views. Just as Lord McNally quoted the views of the Head of the Catholic Church (whose senior Clergy are not represented in the House of Lords), in an older (and un-related) debate in the House of Commons, the then Home Secretary, Jack Straw read out a letter from the Catholic Cardinal Archbishop, Basil Hume in the debate on the Human Rights Act of 1998. Jack Straw followed this up with a letter from the Archbishop of Canterbury. The voices of the Church, Anglican or Catholic were clearly heard in Parliament that day. And when appropriate or necessary, the voices of other religious groups will also find a way to be heard in the Chambers of Westminster.

It may not be impossible for a group of 'experts' to thrash out the implications of changing or repealing a historical statute. But the exact changes that are achieved depend on the political will of different parties in the debate and their resources. We have seen this in the Disestablishment of the Irish and Welsh Churches in the previous century. The ability of religious groups, agnostics, liberals, human rights activists, humanists and other interests to muddy the waters when any debate on Church-State relations happens in Parliament is taken as given. It is in this context of major debates within Church and society on substantive issues like the Act of Settlement, the role of women and gays in Church and beyond, the implications of adopting the European Human Rights Convention and so on that we have to address the implications of Establishment. The most important implication of Establishment from the perspective of the law is that it has introduced very specific procedures for ecclesiastical legislation. The impact of the big debates on Parliament and the Church are manifested when Measures linked to these big debates appear in Parliament as they occasionally do. How do Establishment and the associated procedures of Ecclesiastical law-making affect the evolution of the Church of England and of English society in the direction of social harmony and inclusion?

This is by no means as simple question and the answer is surely not a simple one. The advantage of having the current constitutional arrangements is that Church decisions that impact on major social concerns are at least considered in a wider domain that includes representatives from a broader society. This can arguably create checks and

balances that are more likely to ensure a broader social acceptance. However, when we look at the detailed procedures through which Ecclesiastical Laws are made, the reality is somewhat more complex. The procedures in question reflect historical compromises and are by no means immune from manipulation or capture by small minorities in Parliament or the Church if they are well-enough organized. The outcome can therefore easily be unsatisfactory from the perspective either of Parliament, or of the Church or both.

More significantly, the outcome can also be unsatisfactory from the perspective of broader society. The current legal procedures for making ecclesiastical laws *could* potentially be a positive source of information and regulation for the Church but could in principle also make the evolution of the Church more difficult and less in line with broader trends in society. Furthermore, we have also seen that piecemeal reforms can have unexpected consequences and can make the arrangements as a whole even more difficult to implement. Understanding these dilemmas can help to structure a constructive debate about whether further reforms are desirable and the problems that reformers would need to address for the outcome of the reform to be more desirable than the status quo.

CHAPTER 8. A TALE OF TWO LEGISLATURES

This chapter looks at some of the most important issues raised by the existence of two legislatures for Ecclesiastical legislation. We look at the current relationship between Parliament and Church through a number of lenses. The broader aspects of Establishment affect the Monarchy, the House of Lords, secularism and multi-culturalism in modern Britain. These issues contribute to the broader debate about Establishment and set the context in which the implications of Establishment have to be assessed.

8.1 Parliament and its relationship with the Established Church

What is the role of Parliament in the affairs of the Church of England? In his chapter "The Church of England and Parliament", Enoch Powell sets out the constitutional basis of this relationship. He points out that following the 16th century settlement where the Crown of England became the Supreme Governor of the Church of England, the consequence of this constitutional development was that the

> "…Crown which is Supreme Governor of the church is a crown that acts on the advice of Ministers and legislates with the advice and consent of Parliament. It is a parliamentary crown, and the Church of England is accordingly a parliamentary church, not because Parliament represents the Church of England

or is representative of the members of the Church of England, but because the supreme authority in this realm is the Crown in Parliament…[426]."

As discussed in earlier chapters, the Enabling Act of 1919 curtailed the authority of Parliament to initiate legislation for the Church[427]. Shorn of the right to amend Measures, Parliament was left with the limited responsibility of discussing Measures after the Ecclesiastical Committee had declared it as expedient. So the question we have to ask ourselves, looking back at the nine decades since the Act was adopted, is the following: Did Parliament play a constructive role and should it continue to play a strategic role in monitoring Church legislation?

Our answer is a qualified yes. The case studies discussed in Section II show how Parliament has not been a dispassionate "rubber-stamping" machine. It has flexed its limited muscles, and made a difference in cases where it felt necessary. Clearly, if the Church of England is to remain "Established by Law", Parliament has to have a voice in Church affairs. It has a constitutional responsibility to ensure that any action or decision taken by the Church is appropriate[428]. It is however also appropriate that Parliament no

[426] Powell (1986), p 118.

[427] Bogdanor's assessment of 1919 Act was that it had "worked on the whole successfully" and "offered a practical resolution of what might have been an intractable conflict." Bogdanor (1995), p 225.

[428] The meaning of "expedient" according to The Concise Oxford Dictionary (6th Edition, p 364) was something that was "advantageous" and "suitable". Interestingly in the example of how the word could be

longer has “operational” responsibility for issues such as doctrine and worship in the Church[429].

8.2 Bishops in the House of Lords

Apart from legislative scrutiny of "Church of England Bills" as Measures can be described, which has been discussed in an earlier chapter, there is another bridge between Church and State where Parliament forms a vital link. This link is the presence of Church of England Bishops in the House of Lords. At present, there are 26 members of the Church of England, who make up the body of Lords Spiritual in the House of Lords. These twenty six senior clergy of the Church and the hierarchical order include the Archbishops of Canterbury and York, the Bishops of Winchester, Durham and London, and a further 21 diocesan bishops who sit according to seniority.

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used, the suggestion in the dictionary was to use it in the context where something was “politic rather than just.” During the debate on the Ordination of Women Priests, Simon Hughes, who was a member of the Ecclesiastical Committee defined the process of looking at expediency of a Measure as examining whether it was ‘...timely, appropriate and suitable…’(c 1114).

[429] Benn (1984) makes an interesting observation that the Church of England (Worship and Doctrine) Measure, which granted the Church of England freedom from Parliamentary interference in matters spiritual can be repealed by Parliament. He refers to this possibility as being “constitutional theory”, which is true as no Act of Parliament can dictate or control the legislative freedom of the next Parliament. So by this implication, this freedom for the Church is not cast in stone.

This composition of twenty six senior Clergy as Lords Spiritual is destined to change as the Coalition Government elected in 2010 proceeds with reforms of the House of Lords that had begun under the previous Labour administrations. Almost all the recent Commissions and White Papers[430] on the future of the House of Lords suggest a change or reduction in the number of Church of England representatives in the House of Lords. In the reform proposals published in May 2011[431], the House of Lords Reform Bill, the Government sets out its position on why it is reducing the "nominated" component in the House of Lords. This is something that is being directed at the whole body of the House and not just at the members of the Church of England. The foreword set out the aims as follows:

> In a modern democracy it is important that those who make the laws of the land should be elected by those to whom those laws apply. The House of Lords performs its work well but lacks sufficient democratic authority. The House of Lords and its existing members have served the country with distinction. However, reform of the House of Lords has been on the agenda for more than 100 years and many Governments have considered the complex issues, which surround it but full reform has not yet been achieved.

[430] *A House for the Future* (Cm 4534, 2000) (The Wakeham Report) and The House of Lords, *Completing the Reform* (Cm 5291, 2001), *The Second Chamber: Continuing the Reform* (HC 494-II, 2002).

[431] http://www.official-documents.gov.uk/document/cm80/8077/8077.pdf

In his written evidence to the House of Commons Public Administration Select Committee on the reform of the House of Lords[432], Professor Iain McLean, Professor of Politics, University of Oxford, made this submission:

> Contrary to the claim in the Royal Commission Report (Cm 4534, 15:9), the presence of the Church of England Bishops in the House of Lords has not always promoted 'ever greater religious tolerance and inclusiveness'. A dispassionate historian would have to say that until the 20th century it did just the opposite. Between 1893 and 1914, the Bishops voted *en masse* against Irish Home Rule and Welsh Disestablishment. As they were disestablished in Ireland in 1869, it is hard to see how they felt entitled to vote at all on Home Rule; and in Wales, their denomination was a small minority sect. If faith communities are to be represented in proportion to size, then the Church of England should have approximately 21% of those seats. Nothing in Cm 4534 nor in the White Paper explains why the *ex officio* representation should remain.

Looking at the data from the National Office of Statistics on faith communities in the United Kingdom, Professor McLean presented a projection table of how the seats could be allocated, if the Government were to follow the recommendations of the Wakeham Commission and reduce the number Church of England Bishops from the current twenty six to sixteen. If the Church of England following was 20.9 per cent of the population according to the National Office of Statistics (2002) this corresponded to 16

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[432] The Second Chamber: Continuing the Reform. Volume II: Minutes of Evidence and Appendices. HC 494 II. (2002)

Anglican Bishops. According to Mc Lean's projection, this was how any future allocation of other faiths groups would add up[433]:

Anglicans	16
Catholic	17
Free Churches	12
Presbyterian	10
Orthodox	2
Non-Trinitarian	5
Buddhist	0
Hindu	2
Jewish	1
Muslim	6
Sikh	4
Others	1

Total Number of Religious Representatives[434] in the House of Lords would thus add up to 77.

In a slightly different argument from that of McLean, Cornwell also feels the presence of Bishops in the House of Lords is not helpful. He suggests that the "bishops in the House of Lords are symbolic figures but the trouble is that the symbols are saying the wrong things...(T)he spotlight falls in the wrong place. The symbol encourages the still lingering belief that, for the church to be present, a clergyman has to be wheeled in[435]".

[433] The Second Chamber: Continuing the Reform. Volume II: Minutes of Evidence and Appendices. HC 494 II. (2002). These numbers are taken from Table 2 "Faith Communities in the UK" of Professor McLean's written submission to the House of Lords Reform body. (Ev 173). Professor Mc Lean used the Office of National Statistics, UK 2002 Table 15.1 of the numbers of different faith groups in the UK to extrapolate what that would mean for a House of Lords if Religious Representatives were to be nominated to reflect the breakdown of different faith groups.

[434] In her *Public Law* article on 'The Place of Representatives of Religion in the Reformed Second Chamber', Charlotte Smith suggests that the phrase "representatives of religion" remains enigmatic. It is, for example, unclear to what extent representatives of religion would be required to act as mouthpieces for their organisations or, in contrast, as individual members of their religious communities. Smith (2003), p 675.

A more recent example of how increasing the number of religious representatives in the Second Chamber could be dangerous is the way in which Church of England Bishops voted in the recent Equality Bill that came before the House of Lords[436]. In his *Ecclesiastical Law Journal* article on "The Future of 'High' Establishment", Morris pointed out that on the day of the vote in the Lords "an unusually large number" of Church of England Bishops attended the session and voted as a block against Government proposals[437]. The Government lost by five votes, the number of Bishops voting as a block was eight. The debate in the Lords had the same tone and raised the same concerns as had been raised by Bishops when they wanted to exempt the Church from some aspects of the Human Rights Act in 2002.

Charlotte Smith also raises this point in her article when she says that:

> Concern might also be raised, however, that the inclusion of representatives of religion in that second chamber may open it to the influence of bodies which do not conform to the liberal traditions of the United Kingdom, particularly in controversial matters such as divorce, homosexuality and abortion. Given the

[435] Cornwell (1983), p 65.

[436] 25 January 2010.

[437] *Ecclesiastical Law Journal* (2011), 13: 206-273. Morris pointed out how it was only the retired Bishop of Oxford, Lord Harries of Pentregarth who voted with the government.

> strong, and arguably illiberal, views of some of the faith communities upon these most sensitive issues, such reservations are not without foundation[438].

A different viewpoint was presented by Lord Hurd[439] of Westwell in his chapter in Michael Brierley's book to honour the contribution made by Richard Harries, the retiring Bishop of Oxford to public life. In his chapter, "The House of Lords and Religion", Lord Hurd suggested that public policy should be viewed "…from many points of view and…that faith should…be one of them…[440]." Supporting the need to keep the Bishops in a reformed House of Lords, Lord Hurd acknowledged that there have been instances in the past when the Bishops in the House of Lords have used their "temporal power intolerably" (Great Reform Bill of 1832), however the recent contribution made by the Lords Temporal has been more positive. A reminder to the government of the day that "…they are accountable not only to those who elect them but also to a higher authority…[441]."

[438] Smith (2003), pp 685-686.

[439] Douglas Hurd began his career in the Diplomatic Service and then followed the family tradition and joined politics. His father and grandfather were both Members of Parliament. Lord Hurd won the seat of mid Oxfordshire in the 1974 General Election. Under the leadership of Thatcher, he headed the Home Office and was Secretary of State of Northern Ireland. In the 1990 Conservative Leadership Election, Hurd came third and was appointed as Foreign Secretary by the winner of the 1990 Election, John Major. Hurd retired from the House of Commons in the 1997 election and was made a peer in the same year. A practicing member of the Church of England, Hurd was part of the Wakeman Commission, which looked at the reform of the House of Lords.

[440] Hurd (2006), pp 157-164.

[441] *Ibid*., p 159.

In the chapter, Lord Hurd goes on to quote from the submission made by the then Chief Rabbi Sacks to the Wakeham Commission who suggested that

> "…in a plural society…moral authority does not flow from a single source. Instead it emerges from a *conversation* in which different traditions (some religious, some secular) bring their respective insights to the public domain…health of a free and democratic society is measured not by representative institutions alone. It is measured also by the strength and depth of the public conversation about the kind of social order we seek…[442]."

It is still unclear how the Coalition Government intends to progress with reforming the House of Lords, at this moment it seems as if the ball has been kicked into the long grass. However, it does seem that the continued presence of "faith" leaders (with the Church of England Bishops being in a majority) in the reformed second chamber is inevitable. The focus of this thesis is on the Ecclesiastical Committee and the role of Bishops in a reformed second Chamber is not going to be examined in any further detail. It is worth looking at two of these books for more insight into Judith Maltby, Whyte and Chapman (eds.), published in 2011, *The established church: past, present and future* and the research by Lewis-Jones on *Reforming the House of Lords: The Role of the Bishops*. (The Constitutional Unit, UCL, 1999).

[442] Hurd (2006), pp 158-159.

8.3 Free to decide on worship and doctrine

The procedures established under the Enabling Act removed from Parliament the power to initiate legislation concerning the Church of England. However as far as Measures of doctrine and worship were concerned, the role of the Church had been limited by the Act of Uniformity 1662, which imposed on the nation a prayer book from which the Church could not easily deviate[443]. While the Church Assembly gave the Church greater legislative authority than it had had, the limitation of this settlement (from the point of view of the Church) became evident when the Measure to revise the Prayer Book was rejected by the House of Commons in 1927-1928[444].

In 1965, the Church introduced an experimental Measure that, for a limited period of twenty years, would allow it to make certain decisions on the form of worship without reference to Parliament[445]. The problem, which the Church faced as it approached the end of the experimental period, was that even if it was able to get Parliamentary

[443] Only minor modifications had been permitted by Parliament in the Universities Tests Act 1871 and the Uniformity Amendment Act 1872.

[444] The Church Assembly passed the 1927 Book by 517 to 133 votes. The House of Lords approved it by 241 to 88 votes but the House of Commons rejected it by 247 to 205 votes. In 1928, the House of Commons rejected the Book by 266 to 220 votes.

[445] The 1965 Prayer Book (Alternative Services) Measure was introduced in the House of Lords by the then Archbishop of Canterbury, Michael Ramsey as an experiment to introduce "piece-meal change" in order to avoid the repetition of the 1920's which he admitted was "...the construction all at once of a new Prayer Book...". HL Deb18 February 1965 c 657.

approval for an alternative to the 1662 Prayer Book, it would not gain freedom over its worship as any future changes would again be subject to a Parliamentary veto[446].

This situation changed in 1974, when interests within the Church in favour of greater doctrinal autonomy succeeded in getting the Worship and Doctrine Measure approved to make permanent the changes introduced by the 1965 Measure. Hugh Fraser MP raised the point that, in effect, the Measure was changing the relationship of Parliament to the Established Church by, "...asking the House to retain the status of the Established Church while taking away from this House the power and the responsibility for its existence...[447]". Enoch Powell questioned the basis of the assertion by the Archbishop that the Church should have the right to order its own worship. He went on to say that what they were deliberating in the House was whether the character of the Church, which was established by law "with a specific belief, and specific forms of worship which correspond to that belief", should be changed by this "revolution in the constitution of the Church of England"[448].

There were others who raised constitutional matters, such as the implication such a Measure may have for the Monarch as the Supreme Governor of the Church of England. The point in question was the Coronation Oath of the Monarch, where the Sovereign would have to promise that he or she would "maintain and preserve inviolably the

[446] A point emphasized in the Chadwick Report (1970), p 18 (paragraph 50).

[447] HC Deb 04 December 1974 vol 882 c 1612.

[448] HC Deb 04 December 1974 vol 882 cc 1666-1667.

settlement of the Church of England, and the doctrine, worship, discipline and government thereof, as by law established in England". Ivor Stanbrook asked:

> How can we now transfer from ourselves - as the Queen in Parliament - the power ultimately to determine the doctrine, worship and government of the Church without causing Her Majesty to break the spirit, if not the substance, of that Oath[449]? Is this a matter of no consequence for the supporters of the measure? Is the Coronation Oath so lightly to be set aside[450]?

Stanbrook went on to make the emotional appeal that the Church was not "...a piece of property which can be handed over to any one group of people. It is a part of our history. It is an important feature of our constitution, a part of every Englishman's inherited sense of tradition. It is the heritage of the common people...[451]".

In his contribution to the debate, John Cope suggested that

> We have constitutional rights and duties *de jure* but I believe that, *de facto*, we are not quite in the position we seem to be in. Our rights *de*

[449] Bogdanor makes an interesting point about oaths taken by the Sovereign on accession, which is the correct constitutional position, rather than the emotional point being made by Stanbrook. According to Bogdanor, the Irish Disestablishment in 1869 and Welsh Disestablishment in 1914 "show that the sovereign's oath, made upon accession, to preserve the Church has no legal effect, and, parliament being sovereign, could not be brought into play to prevent disestablishment". Bogdanor (1995), p 221.

[450] HC Deb 04 December 1974 vol 882, c 1626

[451] *Ibid.*, cc 1626-1627

> *facto* are like the rights of the sovereign, as Bagehot described them - the right to be consulted and the right to encourage and the right to warn...I recognize that there is a difference and that the analogy with Bagehot is not quite the same, if only because the King can go on warning whereas we are asked here today to vote away most of our rights to be consulted. I am very unhappy about this measure...[452].

However, despite deep misgivings of Members of both Houses, the Measure was approved by Parliament, which paved the way for the Synod to publish the Alternative Service Book in 1980 without reference to Parliament. Some members of Parliament saw the introduction of the 1980 Prayer Book as a possible breach of the 1974 agreement and an abortive attempt was made to pass a measure in the House of Lords, which would provide statutory protection to the 1662 Prayer Book[453]. However, the opposition of the government to this Private Members' Bill introduced by Viscount Cranborne ensured that the bill failed. According to the then-Lord Chancellor, the attempt by this Private Member's Bill to restrict the power of the Church to decide on doctrinal issues would have raised "grave questions of constitutional propriety[454]". The

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[452] *Ibid*., c 1604.

[453] The Prayer Book Protection Bill 1981.

[454] HL Deb 8 April 1981 vol 419 c 627.

freedom of the Church to decide on issues of doctrine and worship was thus implicitly re-affirmed.

During the 1980s, the relationship between the Synod and Parliament experienced some strain. Medhurst and Moyser attribute this to a perception within the Synod that some Members of Parliament were intervening unnecessarily in ecclesiastical matters and in Parliament there was a feeling

> ...not wholly confined to members of one party, that synodical spokesmen have not always shown enough care in drafting legislation and may even have taken the legislature's compliance too much for granted. Above all, there are signs that some Members of Parliament have become irritated by the general drift of Church policy and so have subjected ecclesiastical legislation to a detailed and time- consuming scrutiny that might not otherwise have been deemed necessary...[455].

The 1974 Measure was a significant step in the process through which the constitutional jurisdictions of Church and State were being re-defined. It may have strengthened the position of the pro-Disestablishment minority within the Church, who were deeply hostile to any temporal controls over the ecclesiastic legislation of the Church.

[455] Medhurst and Moyser (1988), p 310. One such example was the Report of the Archbishop's Commission on Urban Priority Areas. There were elements in the Conservative Party who strongly objected to the contents in the report, which they saw as the Church's foray into politics.

The 1980s also witnessed the most serious proposal for Disestablishment in the form of a Bill drafted by the veteran Labour Politician Tony Benn to break the historical links between Church and State. In an article in Reeves' book, Benn presented his thinking behind the Bill. In his article "A case for the disestablishment of the Church of England" he pointed to some of the anomalies in the Establishment of the Church of England. One was that it left the Monarch in a strange position of being the Supreme Governor of the Church of England when in England and then the Monarch "changes her denomination to preside over the Church of Scotland when in Scotland even though in that capacity she enjoys no power of patronage nor can Parliament intervene in Scottish affairs[456]". The second was the absurdity of having a woman as Supreme Governor "albeit with powers that do not extend into spiritual matters[457]" but not permitting women priests in the Church (this was written prior to 1993 Measure that allowed women priests to be ordained).

Establishment is based on a number of inter-dependent compromises. Depriving the State of any power over the ecclesiastical legislation of the Church of England must also imply that the Church of England will eventually lose its privileged constitutional status. The value of the latter in the eyes of the Church is thus a critical factor determining its support for establishment. Most members of the Church of England are therefore concerned only to reform the procedures through which ecclesiastic law is made, given the considerable autonomy the Church has already achieved. There is a

[456] Benn (1984), pp 68-69.

[457] *Ibid.*, p 69.

valid argument that can be made for reform given the late hours when most Church of England Measures are discussed in the Commons. The only people who seem to remain for these debates are MPs who are Members of the Ecclesiastical Committee or individuals who have a personal interest in that particular legislation.

Indeed given the shift in the balance of legislative jurisdiction over Church of England affairs in favour of the General Synod, it is more likely that questions about Establishment will now come from other denominations that wish to contest the Synod's privileged position[458]. The re-assertion by the Church of its right to legislate on matters of doctrine and worship also raises the possibility of a conflict between such legislation and other principles of rights and responsibilities. The incorporation of the European Convention on Human Rights (ECHR) into British law briefly opened up the possibility of the Church as a public authority being required by law to conform to the principles enshrined in the ECHR. Several Amendments were forwarded in Parliament during the debate to provide the Church with additional protection from some of the regulations of the ECHR. The argument was made that for many of these amendments the Church may have found itself in an awkward position because it would have "to act in ways that are contrary to (its) religious principles"[459].

[458] For instance other religious denominations have questioned the justifiability of having just Church of England bishops in the House of Lords.

[459] The Bishop of Ripon quoted in The Daily Telegraph Thursday 18 December 1997.

Although, in principle, the Human Rights Act would be applicable to any organization providing public services (and therefore to all religious organizations), the Church of England as the established church and the Church of Scotland (with its special status under the 1707 Treaty of Union) took the lead in organizing opposition to the incorporation of the ECHR. In the debate, Lord Ripon argued that without this exclusion the historical freedoms of the Church of England would be reversed[460]. Thus the domestic compromises, underpinning the Establishment of the Church of England, face challenges not only from other religious denominations but also from supra-national definitions of rights and responsibilities[461]. Whether these adjustments can be made within the limits of the constitutional arrangement defining Establishment remains to be seen.

It is also possible that internal changes within the Church may result in changes in the way in which legislation is proposed and debated within the Church. In a 1998 article, the Guardian quoted from a leaked memo of the Church of England - written by a senior policy maker of the General Synod - describing the Synod as "terminally tedious" and a "refuge for the pedant, the bureaucrat and the bore". The article suggested that the Church might have to follow the path of modernization, which the Labour Party and the Monarchy had been forced to adopt in recent years. If so, the issue may not be the independence of the Church vis-à-vis Parliament and the Crown but rather of devising

[460] *Ibid.*, c 1260.

[461] Gordon, R. & Wilmot-Smith, R. (1996), p 53 Klug makes the case for secular ethical values (such as human rights) as the appropriate basis of trans-national norms.

new ways of making the Church responsive to the needs of its ordinary members and breaking out of the synodical process which the memo concludes "can lock us into total irrelevance"[462].

In his book *Church and Nation*, Cornwell argues that the bond between Church and State is symbolic of the unity of the nation under God and goes on to say that matters

> "...secular are held under the ultimate rule of God by a number of powerful symbols. The Archbishop of Canterbury crowns the sovereign, who is both head of state and Supreme Governor of the Church of England. Some of the bishops of the established church sit in the high court of Parliament. The business of political debate is preceded in both Houses by acts of prayers led by the clergy of the national church. These symbols, it is argued, show that the nation officially acknowledges Christian beliefs and values..."[463].

8.4 A Department of State?

This idea that the Church has to operate as a "State Department" has its roots in Erastianism, the philosophical position that the Church had to follow the lead and guidance of the State. The anomalous position that the Church of England finds itself as an Established Church led to Lord Berwick, who later became head of the Ecclesiastical

[462] The Guardian, 20 March 1998.

[463] Cornwell (1983), p 55.

Committee in 1985, to make this remark in a motion introduced in the House of Lords by Lord Grantchester in 1971 to discuss a proposal to disestablish the Church of England[464]:

> First, I share the distaste of the Commission for the term "establishment". It is an emotive term. It does the Anglican Church no good at all. It is responsible for misunderstanding, if not for downright antagonism. Indeed, there was one member of my Party who last week said to me that he was against the establishment of the Church of England because he thought it involved financial support of the Church by the State through taxation. But although I believe the term "establishment" to be a liability, at the same time I think it would be wrong to speak of disestablishment as if it meant the State disowning the Church[465].

This idea of the Church being part of the State apparatus was used by Tony Benn when he presented a hypothetical scenario of what would happen if the Church had not been established and the "public outcry" which would have taken place if the Church were to be nationalised now, and "its leaders subject to political patronage and control of the order of service", or another scenario, were the State to claim control over other religions such as Jews, Buddhists, Hindu or Muslim communities.

[464] HL Deb 20 January 1971 vol 314 cc 485-501.

[465] *Ibid.*, c 495.

In their book *Political and Democratic Control in Britain*, Weir and Beetham look at the role of interest groups in their chapter on "Networks in Power" where they state that the reason why

> …major organised interests of this kind seek to influence government officials is obvious. Government has the power to legislate and make regulations, to acquire political powers and administrative authority, to set taxes and to allocate resources. Major interests thus negotiate with government officials, pass on specialist knowledge and ensure that their members co-operate with the legislation and policies, which emerge from policy communities in order to advance and protect their interests. They naturally achieve their objectives more readily than poorer pressure groups, which do not represent powerful sectional interests whose co-operation government departments require…[466].

As a pressure group, the Church has the dubious advantage of being an insider and therefore being able to use this "insider" privilege to lobby on its behalf. However, in a strong argument defending the presence of Prelates in the House of Lords, the former Archbishop of York, Cyril Garbett in his book, *Church and State in England* defends their presence as necessary, especially during debates on Church Measures, for

> "...if questions arise in connection with them, the bishops possess special knowledge, which enables them both to expound the proposed reform and to reply to criticisms... As long as the consent of Parliament is required for so many

[466] Weir and Beetham (1999), p 275.

> ecclesiastical reforms it is only reasonable that there should be in one of the Houses those who are able to advocate them with first-hand knowledge...[467]".

Writing in 1947, Garbett made the point that it was the historical legacy of how the Church of England came to be Established that the

> "...powers of control by the State over the Church led both statesmen and churchmen in the seventeenth and eighteenth century to look upon the Church as a department of State. Politicians assumed that this was so, and churchmen rarely raised their voice in protest. Its bishops were the nominees of the party in power, its Convocations were silenced, legislation concerning it was carried without its advice or consent, and its pulpits were tuned in accordance with the will of the Government...[468]"

There has been a small but significant number of the Anglican clergy who have highlighted their concern that the control of the state prevents the Church from being sufficiently independent. In his foreword to the article written by McLean and Linsley on *The Church of England and the State: Reforming establishment for a multi-faith Britain*[469], the then Bishop of Woolwich, the Rt Revd Dr. Colin Buchanan suggested that any discussion about breaking the links between Church and State would only come to the top of the agenda if there was "a crisis of church and state relationships". At the moment, he feels there was a perception, especially among a "cluster of

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[467] Garbett (1950), pp 124-125.

[468] Garbett (1947), p 192.

[469] Iian McLean and Benjamin Linsley, (London: New Politics Network, 2004).

parliamentarians…who actually attend debates on ecclesiastical matters – who view parliament as still having a God-given role to 'look after' the Church of England". Buchanan described this group of MPs as "patronizing, usually reactionary, and certainly not representative[470]". Dr. Buchanan's preferred route for change would be for the Church to come forward and "be responsible before God for their own corporate life, their own choice of leaders, their own ground-rules of behaviour – and they should see it first and themselves seek release from their captivity[471]".

8.5 Links to the Monarchy

The Church of England still in many ways represents the religious aspect of the nation. This is most notably seen at the Coronation, when amidst all the splendour of pageantry and colour two figures dominate the scene–the King, representing the State, and the Archbishop representing the Church. It is the Archbishop, who presents the King to the people for their acclamation; it is he who anoints the King, who hands the sword to him, who delivers to him the Orb with the cross shining on it, who places in his hand the Sceptre, and receiving the Crown from the altar sets it on the King's head…. throughout

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[470] *Ibid.*, p iv. The Bishop may have a point here, as is borne out by a poll of MPs carried out in April 2004 by Communicate Research. This poll showed that 57% of the representative sample was in favour of disestablishment. Despite this support, only 37% of all MPs felt that disestablishment of the Church would occur in the next 10 years. 106 MPs were interviewed from the Labour Party, 63 Conservatives and 32 MPs from smaller parties. The data was weighted to reflect distribution of seats in the House of Commons.

[471] *Ibid.*, p iv

the rite the King is seeking the help of God for his great office…. No service could be designed to bring out more magnificently the meaning of the Christian State.[472]

This idealised view of the Coronation ceremony, the interdependence of the Church and the Monarchy and the synergy between the two, as described by Cyril Garbett, who was Archbishop of York from 1942 to 1955, will probably be the minority view in the next Coronation. Bogdanor has described the position of the Monarch with reference to the Church of England, in his book *The Monarchy and the Constitution* as:

> The Supreme Governor is a constitutional position and the sovereign occupies it in virtue of his or her position as head of state, from which it cannot be separated. There is no other qualification for the position of Supreme Governor, and the personal behaviour of the sovereign is irrelevant to it[473].

The "behaviour" of the Supreme Governor may not be relevant constitutionally as pointed out by Bogdanor, but it is relevant socially and politically. Even the current Monarch, who has often been seen as aloof and out of touch with her people, made this revealing speech on her golden wedding anniversary. The Queen talked about how

> "…despite the huge constitutional difference between a hereditary monarchy and an elected government, in reality the gulf is not so wide. They are complementary institutions, each with its own role to play. Each, in its different

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[472] Garbett (1947), pp 189-190.

[473] Bogdanor (1995), p 215.

> way, exists only with the support and consent of the people. That consent, or the lack of it, is expressed for you, Prime Minister, through the ballot box. It is a tough, even brutal, system but at least the message is clear for all to read. For us, a royal family, however the message is often harder to read, obscured as it can be by deference, rhetoric or the conflicting attitudes of public opinion. But read it we must[474].

The commitment of the current Supreme Governor to uphold the values and principles of the Church of England cannot be in doubt. The official reason given for the Queen not attending Prince Charles' civil wedding ceremony was that Prince Charles and Mrs. Parker Bowles wanted a "low-key" ceremony. In an article in *The Sunday Telegraph* with the rather long title "I had to put Church before Charles, the Queen Monarch tells friends her duty as Supreme Governor stops her attending wedding". A friend of the Queen is quoted as saying,

> "The Queen feels she has to put her role with the Church before her role as a mother".

This was followed by a comment by an anonymous royal official who said:

> "The Queen takes her position as Supreme Governor of the Church of England incredibly seriously. She also has great personal faith."

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[474] Hames and Leonard (1998), pp 7-8.

The article also made the point that royal officials believed that the Queen had never attended a civil wedding ceremony in her 53 year reign. There can be no doubt that this legacy of the Queen will be a hard act to follow for Prince Charles. Change is inevitable. The question is how far will these changes go?

The unhappiness with the "compromise", which underpinned this wedding, was felt by some members of Church of England clergy. Rev Rod Thomas, a spokesman for the conservative fringe group Reform in a statement to *The Guardian* pointed out that

> "The prince when he becomes king, will be taking an oath to uphold the doctrine of the Church of England and he will be putting those oaths under strain. The monarch acts with consent and that will be put under pressure too if he is known to have acted in a way that is out of line with the moral teaching of Christianity[475]."

In his book *The Church of England*, Henson described how,

> "The sovereign is, indeed, still excluded from the right, which the humblest of his subjects possess, to determine his own religious profession, but, though this exclusion could only be justified, if justified at all, by his ecclesiastical prerogative, and was in fact originally imposed because that prerogative had been grossly misused by James II...[476]."

[475] *The Guardian* February 12 2005.

[476] Henson (1939), p 43.

For many lay observers, it may seem illogical that the Church was unable to marry the future Supreme Governor of the Church of England but happy to "bless" the union. The demand to discuss this as an emergency matter in the General Synod was turned down by the Rev Richard Turnbull, the chairman of the Synod's business committee, on the grounds that it was not raised by enough members and the proposal for having this discussion was rejected by the Archbishops of Canterbury and York. Turnbull was quoted in *The Guardian* as saying that there was already a "full and demanding agenda" which was already in place for the week of the Synod and that "something that is of interest to the public is not the same as being in the public interest[477]".

A lead story in *The Guardian*[478] titled "Royal Wedding: Crowning nonsense" on the civil wedding of Prince Charles made this point:

> The importance of today is that it marks a point of irrevocable disjunction between the supposed mysteries of the monarchy and its modern reality. In one sense, that is all fine; a remarried king may not be inappropriate in a modern society. But ours is not in any way a modern monarchy. It is one that retains largely unchanged, most of the trappings and privileges - many of them now deeply offensive and inappropriate - of the late 17th-century settlement. From today, the gulf between the two becomes insuperable... if the case for the

[477] *The Guardian* "Synod is refused a royal debate". February 15 2005.

[478] *The Guardian*, 9 April 2009.

> sovereign as head of a meaningful faith has gone, then the case for the sovereign has changed too...from today, the gap between the fantasy of monarchy and the reality has never been wider or more in need of reform.

On the Sunday following the wedding of Prince Charles with Camilla Parker Bowles in a registry office, writing in the *Sunday Times*, Rod Liddle suggested that

> there is not very much mystery or grandeur left when the heir to the throne is forced to queue up behind commoners to marry his bride in a register office, assailed by laughter off-stage. There is not much force majeure left in a church which sees its protector-in-waiting choose to follow his heart rather than his "duty"[479].

The links of the Church to the Monarchy makes the Monarchy vulnerable, and by association the Church of England if the "behaviour" of the Supreme Governor is seen as being contradictory to the core teachings of the Church. If public support for the Monarchy dwindles in the future, the Church will be tarnished too. Although no longer a subject that strongly divides opinions, in his book on *The End of House of Windsor*, Haseler made the point that "...the Supreme-Governor-elect of the Church of England –

[479] *Sunday Times*, 10 April 2009. In the article Rod Liddle remarked that " ...neither royalty, marriage nor the C of E looked in good nick... in these last few months Prince Charles has endured more humiliation than any British royal since King Edmund was tied to a tree by sniggering Danes in AD 870 and fatally poked with a succession of arrows...". The irreverent views of Liddle towards the future King of England may still be the minority view in this country. There is of course the possibility this may change over time.

was openly and spectacularly unfaithful to his wife...[480]", which will, in all likelihood, become an issue for traditionalists within Church when Prince Charles has to be anointed as the next Supreme Governor of the Church.

The nexus of Church and Monarchy has been described as a 'crowning' relationship by Haseler. As the Supreme Governor of the Church, the Queen appoints the Archbishop of Canterbury; and in return, the Archbishop 'crowns' and 'anoints' the monarch during the coronation ceremony[481]. The risk of associating the Church so strongly with a single 'family' is that it then becomes dependent on that family "...being sensible, judicious and acceptable...[482]". The other issue that Haseler highlights with the links of Church and Monarchy is that it represents "...that strain of English paternalism in which a single 'official' authority, or 'official' family, or 'official' Church, sets norms and demands respect. It amounts to an unspoken assumption that there exists a single community needing established spiritual guidance enthroning the Church of England as the 'official', self-proclaimed 'conscience of the nation'[483].

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[480] Haseler (1993), p 35

[481] *Ibid.*, p 69

[482] *Ibid.*, p 71

[483] *Ibid.*, p 70

During a seminar at Kings' College[484], Lord Professor Richard Harries suggested that, in principle, if Prince Charles was not happy to adopt the title of "Defender of the Faith" when King this would not be a fundamental problem. It would be discussed by the Church when the time came to look at these matters. In his view the only title that really mattered as far as the Church was concerned was the title of "Supreme Governor" of the Church of England. The title of Defender of the Faith was a pre-Reformation title and therefore not intrinsically linked to the Church of England. According to Lord Harries, the Church was already doing preliminary work on the Coronation Ceremony for the future Monarch. In reply to a question Lord Harries responded that it would be inevitable that the next Coronation Ceremony would be different from the one for the current Queen, although it would remain quintessentially, a Protestant, Church of England ceremony.

The Prince has his critics, such as Holloway, who has suggested that Prince Charles' desire to be seen as a supporter of all Faiths is highly problematic. In his book *Church and State in the New Millennium: Issues of Belief and Morality for the 21st Century*, Holloway argues that,

> you can only tolerate what you believe is wrong. The monarch therefore has to ensure the rights and liberties of those having beliefs with which he or she will disagree. But the monarch does not need a multi-faith indifference as a condition of upholding these rights and liberties...which is incompatible with maintaining

[484] 10th January 2011, at a seminar for Professor Blackburn's Constitutional Law students.

> the true profession of the gospel and the discipline of the Church of England to which he has to swear[485].

Holloway goes on to say that as other lay members such as judges and magistrates, the clergy have to swear an oath of allegiance on being ordained or on being licensed.[486] However, if the Prince of Wales

> "…continues to hold new age or multi-faith beliefs...he forfeits the right to that allegiance. All this calls into question his succession 'according to the law'. Were he to swear his oath without a clear change of mind and heart, many clergy would find it difficult to swear their allegiance to a 'King Charles III…'[487].

It may seem that in the criticism of Prince Charles and his duty and responsibility as the future Supreme Governor of the Church of England, his "character" and "suitability" are issues for some Members of the Church of England even if they do not directly refer to these issues. An indication of this can be seen in the criticism coming from some clergy of the Church aimed at the civil wedding ceremony of the future Supreme Governor of the Church of England. In an article in *The Times*, the former Archbishop of York, Lord Hope made the comment that:

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[485] Holloway (2000), p 52.

[486] The oath is as follows, "I, AB, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, her heirs and successors, according to law. So help me God." Canon C 13, 'Of the Oath of Allegiance', *The Canons of the Church of England*, London, Church House Publishing, 1988, p 72.

[487] Holloway (2000), pp 52-53

> "It was salutary to observe that within 24 hours the Prince of Wales went from the intensely religious celebration of the Pope's funeral in Rome to the intensely social blessing of the civil ceremony that was his marriage. The different ethos of the two Christian events was noticeable. I was extremely uncomfortable with it[488]."

In the same article, a friend of Lord Hope suggested that the former Archbishop of York, supposedly one of the favourite clerics of the current Supreme Governor, also expressed concerns about how the wife of the future Supreme Governor could be crowned Queen of England in a religious ceremony if she had not married the future King of England in a Church of England ceremony.

Another area for discomfort for some members of the more traditional wing of the Church of England is that the Prince does come across as a bit "fuzzy around the edges" about his own beliefs. The Prince of Wales has been criticised for expressing views on other religions, such as his positive comments on Islam[489], which may give heart to his

[488] *The Times* 8 November 2005.

[489] In a lecture in Oxford in 1995, Prince of Wales explained the causes for the distorted understanding of Islam by saying that:

Our judgement of Islam has been grossly distorted by taking the extremes to the norm. . . . For example, people in this country frequently argue that the Sharia law of the Islamic world is cruel, barbaric and unjust. Our newspapers, above all, love to peddle those unthinking prejudices. The truth is, of course, different and always more complex. My own understanding is that extremes, like the cutting off of hands, are rarely practised. The guiding principle and spirit of Islamic law, taken straight from the Qur'an, should be those of equity and compassion.

future Muslim subjects but run the risk of him coming across as less committed to his own faith. This maybe an unfair criticism of a man, who has shown great interest in and knowledge about other religions and cultures; but it could nonetheless alienate some members of the Church of England, who may find it difficult to accept Prince Charles as the next Supreme Governor of the Church of England.

Taking away the "personality" issue from the Crown and Church relationship, Norman Tebbit writing in *The Independent on Sunday*, suggested that to "survive as a focal point of national loyalty, the monarchy can no longer be identified solely with one church any more than one political view, for neither the Church of England nor, perhaps, any Christian doctrine commands overwhelming support…we are no longer as religiously homogenous as we were 50 years ago, and the monarchy would be stronger if we were not wedded exclusively to the Church of England[490]".

There is however a flip side to the Crown and Church relation which is the Crown getting validation from being linked to the Church. At the last coronation, the Monarch took an Oath which is administered by the Archbishop of Canterbury where the soon to be anointed Supreme Governor of the Church of England was asked,

> Will you to the utmost of your power maintain the Laws of God and the true profession of the gospel? Will you to the utmost of your power maintain in the United Kingdom the protestant reformed religion established by law? Will you maintain and preserve inviolably the settlement of the Church of England, and

[490] The Independent on Sunday, April 3, 2005.

> the doctrine, worship and government thereof by law established in England? And will you preserve unto the Bishops and Clergy of England and to the churches there committed to their charge, all such rights and privileges, as by law do or shall appertain to them or any of them[491]?

In the recently published book by Michael Turnbull and Donald McFadyen on *The state of the Church and the Church of the state : re-imagining the Church of England for our world today*[492], the authors suggest that the Coronation Oath is "is an affirmation of the foundation principles of the nature of the State as conceived in England. It is an explicit denial of the secular State, a statement of the bond between church and State and a description of England as a Christian country[493]."

They go on to make the point that although this "medieval (and biblical) view of kingship" may be anachronistic to the "secular lobby", they argue that

> "If we took God out of the coronation what would we be left with? No doubt worthy sentiments could be expressed about the monarch building people together for the common good; about honesty and justice; about the care of children and the elderly; about the defence of the realm and about international co-operation for the betterment of the global community. But what be the

[491] Quoted in Turnbull and McFadyen (2012), pp 89-90.

[492] *Ibid*.

[493] *Ibid*.

inspiration and what would be the authority for carrying through these ideals?[494]"

This relationship of the Church and Crown was described in a article by the *The Guardian,*[495] as a relationship of "mutual validation". Referring to the role played by the Archbishop in the coronation of the new sovereign, the article states that by anointing the monarch, the Archbishop "proclaims God's endorsement of him; but by the same act the Archbishop has secular validation as a central figure in the constitution: the man must confirm and proclaim who is king" and the article concluded by saying that if "the monarch does not need the Church of England, who does?".

This is clearly a relationship of mutual validation. For the church, there is a risk that a Supreme Governor who is indifferent to the values of the Church and brings disrepute to the office may harm the Church. However, on the other hand, the Monarch's constitutional strength and stature is greatly enhanced by being the Supreme Governor of the Church of England and the prestige and dignity that the link with the Church gives the Monarch. On balance it is a relationship from which both sides benefit by being associated with each other.

[494] *Ibid*, p 80.

[495] A broken marriage: Church and State. April 8, 2005.

8.6 A Secular Age

An interesting distinction is made by Lord Richard Harries[496] in his book between a "secular age" and a "secular society". The first term is a description of the age we live in and this process of "irreversible" secularisation was evident in western societies from the 1960s. The Christian faith, according to Lord Harries had to stand up and argue against the "prevailing intellectual assumptions[497]" which regarded religion as a marginal player in politics and in everyday life. Lord Harries says it is harder to describe what a "secular society" means, as he suggests that, it is "totally compatible to be a Christian believer and support a secular society[498]." The kind of secularism that Lord Harries advocates is the Amartya Sen[499] Indian model of secularism where all religious groups are treated alike and the closeness between the State and religion is not relevant as long as no distinctions are made between groups[500].

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[496] Richard Harries was Bishop of Oxford from 1987-2006.He was responsible for the controversial ordination of an openly homosexual priest, Canon Jeffery John as Bishop of Reading. This appointment led to a conservative backlash both within the Church in England and from Anglican Churches from other parts of the world. The controversy eventually resulted in the resignation of Canon Jeffrey John. Following his retirement, Richard Harries was made a Life Peer, Baron of Pentregarth. He is currently Gresham Professor of Divinity and an Honorary Professor of Theology at Kings' College London. He has been a member of the Human Fertilisation and Embryology Authority and chaired the House of Lords Select Committee on Stem Cell Research. He also contributed to the research by the Wakeham Commission on reforming the House of Lords.

[497] Harries (2011), pp 11-12

[498] *Ibid*., p 12.

[499] Amartya Sen (born 3 November 1933) is an Indian economist who won the Nobel Prize in Economics in 1998. He has written extensively on welfare economics and a very influential book on understanding famines. He was the first Asian academic who was Master of an Oxbridge College (Trinity College, Cambridge 1994-2004).

This is not a utopian view, but having seen the Sen Model of secularism at work in India and the relationship of religion and the State in England. It is clear that England has managed to find the balance of secularism that India can only aspire to (despite having the ideal of secularism enshrined in the Indian constitution). A description of this "secular society" at work was presented by Kathleen Jones in her book, she describes how at any State occasion with a religious presence (a Royal wedding, a funeral or the consecration of an Archbishop

> "…we can expect to see in an Anglican Cathedral the red cassock of a Roman Catholic Cardinal, the blue-grey uniform of the Salvation Army, the tall hat of an Orthodox patriarch, the black of a Jewish rabbi, and even the yellow of a Buddhist monk's robe…[501]".

Even the ardent atheist Dawkins whose book *The God Delusion* attacks religion for subverting science and sapping the intellect[502], admits that the link between Church and State in England has not made the country religious. He compares England to the United States and acknowledges the 'paradox' of

> "…United States, founded in secularism, is now the most religiose country in Christendom, while England, with an established church headed by its constitutional monarch is among the least. I am continually

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[500] *Ibid*., p 13.

[501] Jones (2007), p 147

[502] Dawkins (2007), p 319. In the book, Dawkins sees religion as being the main cause of war, intolerance and terrorism. Atheism on the other hand stands for altruism and peaceful co-existence. Dawkins suggests that science is based on reason; whereas religion is based on superstition.

> asked why this is, and I do not know. I suppose it is possible that England has wearied of religion after an appalling history of inter faith violence…[503]"

Dawkins offers two hypotheses for the different attitudes to religion between the United States and England and the impact on secularism in both countries. The first is that the immigrants who moved to the States from Europe embraced the Church as a "kin-substitute" to compensate for the loss of comfort from extended family in Europe. The second hypothesis is more interesting and something I agree with which is Dawkins suggestion that

> "…the religiosity of America stems paradoxically from the secularism of its constitution. Precisely because America is legally secular, religion has become free enterprise…England by contrast…under the aegis of the established church has become little more than a pleasant social pastime, scarcely recognizable as a religion at all…"[504].

England has a tolerant attitude to all religions. This is a form of secularism which is inclusive. This process of inclusivity began with the removal of the ban on non Church of England members being eligible to become Members of Parliament and removing religious restrictions in University admissions. The role of religion has been "settled" in this country for over two centuries. There is a risk that this may change if the link between Church and State is changed in the future. The risk is of an emergence of a less liberal, fanatical and narrowly focussed English form of Christianity coming into the

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[503] Dawkins (2007), pp 61-62

[504] Dawkins (2007), p 62.

fore. This would be to the detriment of all religious groups in this country. A pseudo secular state is a much better option for England, where deep religious questions are not the part of the political debate.

8.7 Multiculturalism and Multi-faith Society

> Once the minorities are allowed to join a debate previously confined to Christians and constitutional reformers, it becomes quite clear that the situation is pregnant with the unexpected[505].

It is ironic that the relationship of Church and State is seen as a positive thing by many religious groups rather than a discriminatory relationship that favours one denomination. This became very evident during the protracted debate over the reform of the House of Lords and whether the Lords Spiritual should continue to be part of the reformed House. There is no doubt that England is now a multi-faith society and statistics show that even within the Christian denominations, more Catholics go to Church than Church of England worshippers on a Sunday. There has been a historical decline in Church-going and in a modern society, going to Sunday worship is clearly less of a priority than it was several decades ago. The influx of recent Christian, but non-Protestant, immigrants from Eastern Europe (especially Poland) has increased the

[505] Modood(1997), p 13.

number of Catholic worshipers. All of these factors make the Church of England look less and less like a "National Church" which it claims to be.

In an interesting analysis in his chapter in Madood's book on *Church, State and Religious Minorities*, Parekh looks at the idea of what "equality" means for religious groups and suggests four different interpretations of what equal treatment of all religions mean. The first is that the "State should not prosecute or suppress *any* religion, but may privilege *one* that happens to be integral part of its history and identity"; the second that it should protect "*all* religions equally"; the third being that the State should not "institutionalise or protect *any* religion"; and finally, that religion should be protected "in the same way that it grants extra protection to individuals under threat or in special need"[506]. Parekh acknowledges that it is hard to choose one of the four options as the "correct" one as the idea of religious equality is an ambiguous one. He goes on to say that "religious equality means equality of rights *to* religion or equality *of* religions". Madood does acknowledge that the "embryonic multi-faithism" is still "unborn" as "multi-faithism leans more towards establishment than abolition"[507].

In his chapter entitled "Faced by Faith" in *Faith in Law*[508], Anthony Bradney looks at the three liberal responses adopted in modern society to multiculturalism as set out by

[506] Madood (1997), p 18.

[507] Modood (1997), p 13.

[508] Oliver, Douglas Scott and Tadros (2000),pp 103-104

Raz in "Multiculturalism: A Liberal Perspective" in J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*[509]. The first strategy, according to Raz is toleration: permitting minority cultures to pursue their ends as long as they do not interfere with the majority culture; the second is non-discrimination by which there are individual rights against discrimination manifested in particular ways; and the third and final one is affirmation, which seeks to create a variety of respected and flourishing cultural groups. The last is Raz's preferred route, also emphasized by B. Parekh in *Britain: A Plural Society*[510]. This, according to Bradney, seems to offer succour to those religious minorities that feel ignored or oppressed by the State. Bradney feels that the argument of Raz for the superiority of affirmation over tolerance or non-discrimination seems untenable as it rests on the proposition that "it is in the interest of every person to be fully integrated in a cultural group" and Raz argues[511] that it is only through this mechanism of socialization that can one tap the options which give life meaning.

Bradney disagrees with this idea of a single culture driving a modern complex society and argues that in Great Britain there are various sources from which, to quote Raz, people can "tap the options that give life meaning". However he goes on to say that "full integration within one community *can* be a way of giving life meaning and, if a liberal society is to live up to its claim not to select values for its members, the existence

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[509] Raz (1994), pp 174-175.

[510]Parek (1990), pp 68-79.

[511] Raz (1994), p 177.

of this possibility, albeit that it is a considerably more limited position than that advanced by Raz, will be sufficient to justify his argument for the superiority of affirmation over tolerance or non-discrimination".

In his book *Church and State: Uneasy Alliances*, Lamont describes how:

> "…on the twin horns of multi-culturalism and secularism, the Church of England has been gored and is slowly bleeding to death…[512]"

A tragic and graphic picture if it were true. In the 1990 Reith Lectures entitled *"The Persistence of Faith"*, Jonathan Sacks, the Chief Rabbi of Great Britain and the Commonwealth referred to how our current diversity makes many people, outside the Church and within, feel uneasy with that institution. But disestablishment would be a significant retreat from the notion that we share any values and beliefs at all. And that would be a path to more, not fewer, tensions. In a society of plurality and change, there may be no detailed moral consensus that can be engraved on tablets of stone. But there can and must be a continuing conversation, joined by as many voices as possible, on what makes our society a collective enterprise; a community that embraces many communities. Keeping this first language alive means significant restraints on all sides. For Christians, it involves allowing other voices to share in the conversation. For people of other faiths it means coming to terms with a national culture[513].

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[512] Lamont (1989), p 174.

[513] http://downloads.bbc.co.uk/rmhttp/radio4/transcripts/1990_reith4.pdf

In his contribution to Modood's book on *Church, State and Religious Minorities*, Daoud Rosser-Owen asserts that

> Muslims do not, by and large; support disestablishment...Islam has always been in favour both of establishment and multi-confessionalism[514].

In his chapter, "The case for retaining the Establishment", Hastings argues that in reality Establishment

> "…no longer provides any privilege for Anglicans...over other British people, Christian or non-Christian, it no longer makes the rest of us into 'second class citizens…"[515].

This is endorsed by Rabbi Sylvia Rothschild writing from "A Jewish Perspective" in Tariq Modood's book on *Church, State and Religious Minorities*, where she asks what disestablishment would mean "in any real way". She points out that there is no Church of England "requirements incumbent on the rest of us in terms of our life cycle events (birth rituals, marriages, funeral arrangements etc.)...the disabilities in entering parliament have been lifted, there are no related barriers to entering the professions, universities...[516]". An interesting analysis of the gradual dismantling of restrictions and limitations on non Church of England members in the 19th century can be found in

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[514] Daoud Rosser-Owen. "A Muslim Perspective" in Modood (1997), pp 82-83.

[515] Hastings (1997), p 40.

[516] Rothschild, Sylvia. "A Jewish Perspective" in Madood (1997), p 55.

Stuart Anderson's chapter "The Church and the State" in *The Oxford History of the Laws of England*.[517]

In this vein, Hastings argues that

> it may be seen as an accident of history but it is also intrinsic to the character of modern Britain that our Christianity has developed so pluralistically - far more than any other European country....because British Christians have awkwardly insisted upon making it so, obstinately refusing in all sorts of ways and despite all sorts of penalties to accept the erastian principle *cujus regio ejus el religio*[518]...and it is this pluralism far more than establishment which provides the true heart of the church-state experience in this country[519].

It seem therefore that many if not most other minority faiths do not find the established Church of England to be a threat but rather an ally and in most cases are able to bridge the gap of their personal faith and the secularism that is around them. Jonathan Sacks in his Reith Lecture says

> "...religious identity can go hand in hand with a decline along all measurable axes of religious behaviour. We practise the rituals of faith less often. We go to places of worship rarely. We can be, it seems, religious and secular at the same

[517] (Cornish) (eds.) (2010), pp 385-392.

[518] 'He who rules, his religion should rule'.

[519] Hastings (1997), p 46.

time. And religion in a secular society is not what it is in a religious society...[520]".

In their book, Michael Turnbull and Donald McFadyen suggest that the Monarch can speak with greater authority to citizens of other faiths if "she approaches them from a position of faith herself[521]." This may explain why leaders of religious minority groups are happy to operate under the umbrella of Establishment as it gives faith a "protected" status within the political establishment. This may also be the reason why the idea of having Church of England Bishops in the House of Lords has not provoked a hostile response from other religious leaders.

8.8 Moral Challenges

That the Church of England is reactive and not proactive is an accusation levelled against the Church by sections of the media. One does have to have some sympathy for the Church of England and its senior Clerics as it seems to face far greater scrutiny and media interest than other religious groups and Christian denominations in this country. This is, of course, the inevitable price it pays for being the "National" Church[522]. Criticism of the Church of England is not just limited to this country, as it is the "mother Church", it is also open to attack and criticism by other Anglican bodies and Bishops

[520] http://downloads.bbc.co.uk/rmhttp/radio4/transcripts/1990_reith4.pdf

[521] Turnbull and McFadyen (2012), p 93.

[522] With tabloid like the Sun suggesting the Archbishop was endorsing the "Burkha" when he talked about allowing Sharia Law for certain aspects of family law in Muslim communities.

from outside this country. In a story headlined, "Rowan Williams criticised by Australian archbishop[523]", the visiting Archbishop of Sydney, Peter Jensen was quoted as saying that:

> If the archbishop espouses homosexuality, it does not help us but hinders our work ... I would like him to espouse the teaching of scripture, I would like him to change his mind.

In an article for the *Financial Times*, David Gardner described the Archbishop of Canterbury as struggling to "keep his turbulent flock together". Gardner suggests that since his enthronement in 2003 "the Archbishop has often seemed a holy man fallen among factions, demanding of him the skills of a power politician rather than a pastor", split between the more traditional views of African clergy and "grandstanding American liberals" on the question of homosexuality and same sex marriages, and having to face the menacing sight of the "Vatican's tanks parked on his Canterbury lawn, offering the high church an escape corridor to Rome[524]".

It is an unenviable position for The Archbishop of Canterbury to find himself in. His attempts to try and bridge the gap have not been so successful so far. In an article in *The Guardian* "Give prayer a chance to heal church rifts" the Archbishop was quoted as saying that,

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[523] *The Guardian* January 21 2003.

[524] *Financial Times*, July 17 2010.

> The sexuality debate is infinitely complicated by high levels of mutual ignorance . . . If every member of this Synod made a commitment to make contact with someone in another province, who is not likely to share their view, we might at least move away from demeaning caricatures on both sides[525].

This is an interesting imagery to describe what is becoming an increasing problem for the Church of England, as the potential for further defections to the Church of Rome increases with the push towards getting legislative approval from Parliament to ordain women Bishops in the Church of England. The recent approval by the General Synod of this policy means that by 2014 there is the likelihood of the first woman Bishop being ordained in England for the Church of England. The response to the vote in the Synod in July 2008 by the Conservative MP and Synod member Robert Key, who supported the reforms, was that the time had come for the Church to move beyond "navel-gazing". He went on to say that

> it is a good day for the Church of England, and it is a good day for the country because our national church, the church by law established, is actually now in step with most of the country and what people feel[526].

8.9 Criticising Government Policy

[525] *The Guardian,* 17 November 2005

[526] 8 July 2008 “Church vote backs women bishops” BBC online.

The Church of England has a difficult tightrope to walk when it comes to criticising politicians or Government Policy. In the last few decades, it seems to have managed to keep its balance on the whole. One of the criticisms by Tony Benn in his 1984 Article on the Church of England was that the constitutional relationship with the State had muffled Church criticism. This criticism is undermined by evidence of Church criticism in reports such as "Faith in the City" and "The Church and the Bomb". In both reports, the Church of England was openly critical of current Government policies.

In 2003, during the height of the hostilities with Iraq and fears over weapons of mass destruction, *The Guardian*[527] had a piece on the Church of England's opposition to war with Iraq and it referred to the vote in the General Synod, which demanded that any military action had to be sanctioned by international law through the UN. It also reported that the General Synod had called for Ash Wednesday, which was in the week following the vote, to be observed as a day of prayer and fasting for those caught up in the crisis. The newspaper then quoted David Hope, the Archbishop of York, who warned that there remained "among Christians very real doubts about the moral legitimacy of a war with Iraq, with all the human suffering which it will entail".

A similar accusation has also been made against the Church by Members of Parliament. During the brief debate in the House of Lords on the National Institutions Measure, Lord Beaumont of Whitely pointed out that:

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[527] February 25 2003

> As one of the young rebels in the Church of England in the early 1960s, I know how difficult it is to get the Church to move without a small explosive charge to set it off. I believe that those losses on the Stock Exchange were the same explosive charge, which was necessary. It has set it off and we have had the Turnbull report[528].

8.10 Unwritten Constitution

During the debate on Church and State in the House of Lords, Lord Hurd of Westwell, who had been a senior minister in the Conservative Government in the 80's said that "...there is no formal, clanking machinery to describe the relationship between the Church of England and the government of this country. There is, rather, a series of distinct and subtle relationships...(T)he good in these types of relationships is in my view clear and I do not see any harm. There would be harm if the Church became a tool or any ally of any particular government...[529]".

In his contribution to the debate, Lord Williams of Elvel pointed out that it took seven years, with the interruption of the First World War, to disestablish the Welsh Church. With that in mind, he suggested that the disestablishment of the Churches of England and Scotland could also be a lengthy process. Specific to the Church of England

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[528] HL Deb 29 June 1998 vol 591 c 497

[529] HL Deb 22 May 2002 c776

> "Parliament would not only have to abrogate its powers over the rules governing the Church but, presumably, would have to hand over existing legislation to the Church of England Synod. How that would work, I know not; but I suppose that, in turn, the Synod would have to re-enact that legislation if it so wished. But that would be entirely in its discretion...the whole matter of the Crown would have to be re-defined, both as Supreme-Governor of the Church of England and, thereby, as the residual author of Crown appointments. The whole apparatus, for example, of the appointment of archbishops and bishops - not to mention royal peculiars - would have to be re-cast. Transfer of assets would certainly be another problem. In short, the Lloyd George timetable seems to me to be optimistic. It would certainly be a brave government that took it on[530]"

Weir and Beetham point to the "fluidity of government" and go on to say that

> …we live in a constitutional monarchy in which the Queen reigns and her government rules; in which the Crown in an ill-fitting and archaic way embodies the State; and in which the formal statement that executive power is invested in the Crown does not correspond with the realities of government. The historic refusals formally to resolve in a written constitution ultimate questions of executive power, the authority of the government, the separation of powers, the

[530] *Ibid.*, c 795

> rule of law, and the advent of universal suffrage, raise all manner of ambiguities which key figures in the core executive can manipulate at will. They can fashion and re-fashion the rules so that politics, usually the politics of the government of the day, is the final arbiter…[531].

In his chapter "From Toleration to Pluralism: Religious Liberty and Religious Establishment under the United Kingdom's Human Rights Act" in Adhar's book, Julian Rivers suggests that the complex relationship between law and religion, which exists in modern society, is compounded in the United Kingdom

> "... by an absence of any codified Constitution that might set out the basic principles governing the relationship between the Church and the State. As a result, the UK legal systems reflect a history of conflict and accommodation between various religious groups, rather than a system of principled resolution...[532]."

Without the "hindrance" of having to work within a rigid constitutional structure, Sir Kenneth Pickthorn, MP and constitutional historian, pointed out that a Government with a majority in the Commons could "at any moment do anything they like, with retrospective or prospective intention" and that procedure was "all the constitution the poor Briton has[533]".

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[531] Weir and Beetham (1999), p. 302.

[532] Ahdar, Rex. J. (2000), p 133.

[533] Quoted in Weir and Beetham (1992), p. 302.

Touching on the issue of Parliamentary powers of scrutiny and accountability, Weir and Beetham suggest that the

> …doctrine also pre-supposes that an assembly of some 560 non-ministerial MPs, overworked and under-resourced men and women with a conflicting variety of duties, of which scrutiny of the executive is just one, can ensure that ministers fulfil a duty of responsibility across the whole range of executive action. In fact, such a scrutiny is not a priority in a modern House of Commons, which is generally the creature a government sustained firmly in office by a disciplined party majority. Frequently, it is not even a primary objective of the opposition parties, for they know very well that they can only rarely gain any direct advantage in Parliament from their activities there..[534].

There is a risk for the Church of England in not planning for changing times and attitudes. As Garbett suggests,

> "The Church should frankly face the dangers of its position. At the moment Parliament has no desire to exercise active control over the Church or gratuitously to interfere in its concerns. But within a few years a neutral attitude may have changed to hostility, and the Church would find it then useless to ask for reform or for greater freedom. It should not acquiesce any longer in a relationship with the State, which might suddenly prove inconsistent in practice as well as in principle with religious freedom. Churchmen are so accustomed to the existing relationship between Church and State that they fail to see how

[534] Weir and Beetham (1999), p. 367.

> strange and anomalous it appears to other Churches especially those which attach importance to religious freedom[535]."

The discussion in this chapter identified a number of fault-lines that have apparently opened up as a result of the presence of an Established Church in England. The issue of the possible exclusion of minority religions may appear to be the most serious but in reality this has raised the least serious questions in society and for the Church. More significant have been issue around the selection of a Supreme Governor and managing the quid pro quo of state intervention in the Church that is the price of establishment. Both these questions raise issues about the way in which laws are made. Our discussion of the procedural mechanisms for making ecclesiastical laws is therefore relevant for understanding the challenges ahead. These procedures provide scrutiny that is broader than may have been forthcoming from the Church alone but the scrutinizing bodies are themselves narrowly defined and Parliament as a whole is unable to suggest laws or even amendments. This situation means that while in some cases socially acceptable solutions can emerge, the procedures can also hinder the evolution of solutions that are likely to enjoy broad support. The scrutiny of legislation by narrowly defined bodies can under some circumstances enable minority interests within Church and State to set the terms of discussions that need to be much more broadly based or they can hold up important legislation based on their own values and interests.

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[535] Garbett (1947), p 196.

CHAPTER 9. CONCLUSIONS

There are different elements and strands that make up the "Establishment" of the Church of England. In my opinion the link with Parliament is the most fundamental link. It is the safety net of Parliamentary scrutiny of Church Measures that prevents the Church of England from becoming a narrow sectarian body. At the same time, we have seen how the structure of this scrutiny is problematic and the ecclesiastical legislative process can be captured and controlled by small minorities in Parliament and Church. Nevertheless, without the presence of Westminster's shadow on its doorstep and the obligations of being the "National Church", there is a risk that the Church of England may lose its inclusive and broad based appeal that has been the symbol of its existence for many decades.

The compromises that underpin the ways in which the Church and State concordant actually works is best encapsulated by the often quoted statement of Alastair Campbell the Communications Director of Tony Blair when he said “We don’t do God”. This was in the context of Blair as Prime Minister suggesting that he end a TV broadcast with the words “God bless you”. The tensions between the secular reality of modern Britain that led Blair’s communications director to advise him against using religious language and the formal reality of an established Church are at the heart of many of the discussions in this dissertation. In theory, in a liberal democracy, having a formal relationship with one particular religion (enshrined by law) may seem to be an anachronism. However in

practice as Bogdanor put it, "far from spiritualizing the State, it serves to secularize Christianity[536]."

I began this work by saying I lived in India before living in England, and it is time to return to that comparison briefly. India has a secular constitution but its secular ideals are often not reflected in the reality on the ground. Government officials display pictures of their favourite gods in their offices and semi-official acts of worship precede the opening of new roads and infrastructure. In contrast, England with its Established Church is a secular society in its everyday practise. This dissertation has not attempted to explain this paradox but I have attempted to show how the mechanisms through which the crucial link between Church and State are maintained do serve to regulate and expose to public scrutiny the workings of the official Church.

As Fittall put it, "...a reformed, constitutional monarchy, together with a tolerant and hospitable Establishment of the Church of England, has helped to make this country a more tolerant and inclusive society...[537]".

If it is at all possible to ring fence anything in the British Constitution, the role of Parliament in scrutinising Laws for the Church of England should remain, if the Church of England is to remain an Established Church. The recent rejections by Parliament of

[536] Bogdanor (1995), p 229.

[537] Fittall (2008), p 78.

the 1984 Appointment of Bishops Measure and the 1989 Ordination of Clergy Measure and rejections by the Ecclesiastical Committee of earlier drafts of the 2001 Churchwarden Measure show that Members of Parliament are willing to fulfil their duty when it comes to scrutinising Legislation initiated in the Synod and sent to them for approval. They clearly do not see this as a mere rubber stamping exercise. The Church has (even if somewhat unwillingly at first) learnt that Parliament would not sanction any Measure if it seemed to go against the protection, rules and regulations of what the rest of society enjoyed. This was evident in the Churchwarden Measure of 2001.

Finally, there is the risk in the future that if the Church of England were to "do it on its own" it may find itself being challenged in the Courts on procedural matters on how the Law was made. Unlike Canons that only apply to Ecclesiastical personnel and therefore has a limited remit and effect, laws that effect the birth, death or marriage ceremonies of the general public, curriculum or admission policies of Church of England schools and the maintenance or lack of care of any historical building owned by the Church may well become the happy hunting ground of any litigant who can prove locus standi. When considering the vast area that the Church of England may be legislating for, this may turn out to be a challenging and expensive prospect for the Church.

It is inevitable that the links between the Church of England and the Monarchy will weaken and possibly end with the death of the current Queen and Supreme Governor of the Church of England. Often the link of Crown and Church is presented as fundamental for preserving the status quo of an Established Church. It is my view that more than the

Monarch, the link with Parliament is more fundamental for preserving the relationship between Church and State.

It is possible that if and when Prince Charles eventually becomes King, there may be an amicable divorce between Church and State as it seems neither party is keen to stay wedded to each other. The Prince of Wales has had a long association with different organisations as Chief Patron and the Princes Trust has been involved with many social projects, which have often helped deprived and disaffected communities. A role for the future Monarch in the Church may well be appropriate, as a figurehead for the organisation. This would maintain some continuity with history and at the same time allow the Crown and Church to de-link ties that may have become unsustainable for the new Supreme Governor and the Church of England alike.

The constitutional debates that were triggered towards the end of the last Labour administration when a private member Bill was drafted to remove the anti-Catholic bias in the 1701 Act of Settlement is a good indicator that it is possible to repeal historical Acts (or at least to start the process) without the entire Constitution falling apart. In 2011, the Act of Settlement was amended in a seemingly smooth process, with the support and approval of the Commonwealth States where the Queen is still the constitutional head of State.

In the same way, if the future King Charles and the Church of England were mutually agreed on ending the link, it is hard to imagine that the government of the day could not work with the historic Statues and find a way to break that link without causing too much damage. If the future King or Queen of England was no longer required to be called the "Supreme Governor", "Defender of the Faith" or even be in communion with the Church of England[538] and be free to marry a person of any or no faith, the outcome would be a "secularized monarchy" as described by Bogdanor and may "prove to be a monarchy more in tune with the spirit of the age[539]."

This outcome may leave the role of Parliament in scrutinising Church Measures coming from an Established Church of England unaffected. As long as *all* Bills passed by Parliament require Royal Approval to become Law, the Church of England would also follow the same route. That the Monarch would no longer be the Supreme Governor of the Church may not be relevant. There is no need to throw out the baby with the bathwater. Our discussion of the procedures of ecclesiastical law-making did not identify any processes that would be unworkable in the absence of a Supreme Governor. Looking back at Church and State relations since the historical break with Rome, there have been gradual and sometimes more dramatic changes in how the system has worked. There has been an ongoing restructuring of responsibilities and a shift in the power base of both Church and State. It is inevitable that change will continue.

[538] England has had two Sovereigns who were Lutheran and not members of the Church of England.

[539] Bogdanor (1995), p 239.

To end this dissertation, I quote Viscount Haldane from the House of Lords debate on the 1919 Enabling Act. This sentence encapsulates what has driven my research on this subject.

> "I have a constitutional conscience whatever my theological conscience may be[540]".

I have tried to approach this subject from a constitutional viewpoint and looked at one particular aspect of Establishment in some detail: the role of Parliament in making Laws for the Church of England. The mechanisms involved here have sometimes been overlooked in Church-State studies and debates. Establishment is not a static concept and the reason for its continued existence over three centuries has been its ability to adapt and change. Further change is inevitable. It is important that the new "avatar" of Establishment is still recognisable and carries in it the genes of the past and that it builds on the "checks and balances" between Church and State. These pragmatic compromises have contributed to make this country a modern "secular" and "liberal" democracy even if the formal constitutional arrangements underpinning these results include an Established Church.

[540] *HL Deb 03 June 1919 vol 34 c 1010.*

APPENDIX 1

METHODOLOGY AND LIMITATIONS OF THE RESEARCH

The limitations of this dissertation stemmed from the necessity of selecting one aspect of a broad and interdependent set of questions as the focus for research. In a time bound exercise and despite my deep interest in the wider issues of State-Church relations, I tried to restrict my reading and my presentation in this document to the role of Parliament in making Ecclesiastical Law. It was difficult to begin with the Enabling Act of 1919 without explaining some of the historical roots of how Parliament and the Church of England came to be so entwined.

The complex history underpinning the passage of the 1919 Enabling Act was not something I had come across in my early reading of existing accounts of the constitutional settlement of Church and State. Discovering the protracted negotiations in the Lords and Commons in Hansard debates gave my research added impetus as it seemed inevitable that history may well repeat itself and in the near future. The Church of England may approach Parliament with proposals to change procedures again or even to remove the scrutiny (however limited) it still has on Church of England legislation.

The other limitation has been the use of legal and political sources as opposed to theological sources for understanding State-Church relations. It is very difficult to cross into yet another complex discipline and it for this reason that I limited the use of theological sources in my research.

Despite making several attempts to interview members of the Ecclesiastical Committee, I was sadly unable to get an interview. I did not get a response from Simon Hughes and Peter Cormack. After several exchanges of emails with Steve Webb's secretary, I was sent this mail:

Hello Asma,

Apologies for not getting back to you, I've spoken to Steve about an interview and he says that whilst he would like to help, he doesn't play such an active role in the Ecclesiastical Committee to be able to help to any useful extent. Apologies, I do hope all goes well with the viva.

Sam

Sam Burnett
Office of Steve Webb MP
Liberal Democrat Shadow Secretary of State
for Energy and Climate Change
House of Commons
London SW1A 0AA
t: 020 7219 6683
f: 020 7219 1110
e: burnetts@parliament.uk

Eventually I spoke to Lord Harries about my lack of success in getting an interview with a Member of Parliament and he kindly offered to intervene and speak to Stuart Bell who had been Second Estate Commissioner . But it seems the influence of Bishops on Members of Parliament may not be as significant as in the past. The letter from Stuart Bell is also attached below. Nevertheless, even without the interviews, I received a lot of help from librarians in the House of Lords and I was able to access a significant amount of primary material on which this research is based.

HOUSE OF COMMONS
LONDON SW1A 0AA

8 February 2011

Ms Asma Khan
Flat 3
Lisare House
200 Old Brompton Road
London SW5 0BT

Dear Ms Khan:

I am referring to your request that we meet to discuss the subject of your thesis, Parliament and the Church of England: The Making of Ecclesiastical Law.

I am aware that Bishop Harries gave you my name and that I suggested you write to me, but time does not permit me to meet with you to discuss rather broad subject of Establishment and what the future may hold for the Church-State relationship, as well as explaining the workings of the Ecclesiastical Committee both past and present.

I do, however, wish you well in your studies and your interest in what will be, in the years ahead, a topical subject.

Yours sincerely

Stu Bell

Sir Stuart Bell MP

APPENDIX 2

The address to His Majesty by the convocations of Canterbury and York touching the constitution of the proposed National Assembly of the Church of England.

Ordered, by the House of Commons, *to be Printed, 27 May 1919.*

Address from the Convocation of Canterbury

MAY IT PLEASE YOUR MAJESTY,

We, Your Majesty's loyal and faithful subjects, the Archbishop, Bishops, and Clergy of the Province of Canterbury in Convocation assembled, approach Your Majesty with the dutiful assurance of our devotion to Your throne and Person.

We desire to Lay before Your Majesty a recommendation agreed to by both Houses of this Convocation on the 8th day of May 1919 that, subject to the control and authority of Your Majesty and the two Houses of Parliament, powers in regard to legislation touching matters concerning the Church of England shall be conferred on the National Assembly of the Church of England constituted in the manner set forth in the Appendix attached to this Address.

We pray, as in duty bound, that the blessing of Almighty God our Heavenly Father, through our Lord Jesus Christ, may rest upon Your Majesty.

RANDALL CANTAUR

HERBERT E. RYLE (Bp.),

Prolocutor of the Lower House of the Convocation of Canterbury.

9th May 1919

Address from the Convocation of York,

MAY IT PLEASE YOUR MAJESTY,

We, Your Majesty's loyal and faithful subjects, the Archbishop, Bishops, and Clergy of the Province of York in Convocation assembled, approach Your Majesty with the dutiful assurance of our devotion to Your throne and Person.

We desire to Lay before Your Majesty a recommendation agreed to by both Houses of this Convocation on the 7th day of May 1919, that, subject to the control and authority of Your Majesty and the two Houses of Parliament, powers in regard to legislation touching matters concerning the Church of England shall be conferred on the National Assembly of the Church of England constituted in the manner set forth in the Appendix attached to this Address.

We pray, as in duty bound, that the blessing of Almighty God our Heavenly Father, through our Lord Jesus Christ, may rest upon Your Majesty.

COSMO EBOR (President)

W. FOXLEY NORRIS (Prolocutor)

10th May 1919

APPENDIX 3

Clauses of the National Assembly of the Church of England (powers) Bill, 1919.

1919 National Assembly of the Church of England (powers). [H.L.] A bill intituled an act to confer powers on the National Assembly of the Church of England constituted in accordance with the constitution attached as an appendix to the addresses presented to His Majesty by the convocations of Canterbury and York on the tenth day of May, nineteen hundred and nineteen, and for other purposes connected therewith.

[9 &10 GEO. 5] *National Assembly of England (Powers).* [H.L.]

A BILL INTITULED

An Act to confer powers on the National Assembly of the Church of England constituted in accordance with the constitution attached as an Appendix to the Addresses presented to His Majesty by the Convocations of Canterbury and York on the tenth day of May, nineteen hundred and nineteen, and for other purposes connected therewith.

WHEREAS the convocations of Canterbury and York have recommended in Addresses presented to His Majesty on the tenth day of May nineteen hundred and nineteen, that,

subject to the, control and authority of His Majesty and of the two Houses of Parliament, powers in regard to legislation touching matters concerning the Church of England shall be conferred on the National Assembly of the Church of England constituted in the manner set forth in identical terms in the Appendix attached to their several Addresses:

And whereas it is expedient, subject to such control and authority as aforesaid, that such powers should be conferred on the Church Assembly so constituted:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as, follows: -

1. In this Act-

(1) " The National Assembly of the Church of England" (herein-after called "the Church Assembly ") means the Assembly constituted in accordance with the constitution set forth in the Appendix to the Addresses presented to His Majesty by the Convocations of Canterbury and York on the tenth day of May, nineteen hundred and nineteen, and laid - before both Houses of Parliament by His Majesty's command;

(2) "The Constitution" means the Constitution of the Church Assembly set forth in the

Appendix to the Addresses presented by the Convocations of Canterbury and, York to His Majesty as aforesaid;

(3) "The Legislative Committee" means the Legislative Committee of the Church Assembly appointed in accordance with the provisions of the Constitution;

(4) "The Ecclesiastical Committee" means the Committee of His Majesty's Privy Council established as provided in section two of this Act;

(5) "Measure" means a legislative measure intended to receive the Royal Assent and to have effect as an Act of Parliament in accordance with the provisions of this Act.

2. (1) There shall be a Committee of His Majesty's Privy Council styled "The Ecclesiastical Committee of the Privy Council."

(2) The Ecclesiastical Committee shall consist of such 25 members of the Privy Council, not exceeding twenty-five in all, as His Majesty from time to time may think fit to appoint in that behalf, the tenure of the office to be for ten years.

(3) The powers and duties of the Ecclesiastical Committee may be exercised and discharged by any twelve members thereof.

3. (1) Every measure passed by the Church Assembly shall be submitted by the Legislative Committee, to the Ecclesiastical Committee, together with such comments and explanations as the Legislative Committee may deem it expedient or be directed by the Church Assembly to add.

(2) The Ecclesiastical Committee shall thereupon consider the measure so submitted to it, and may, at any time during such consideration, either of its own motion or at the request of the Legislative Committee, invite the Legislative Committee to a conference to discuss the provisions thereof, and thereupon a conference of the two committees shall be held accordingly.

(3) After considering the measure, the Ecclesiastical Committee shall draft a report to His Majesty stating the nature and legal effect of the measure and their views as to its expediency, especially with relation to the constitutional rights of all His Majesty's subjects.

(4) The Ecclesiastical Committee shall communicate its report in draft to the Legislative Committee, but shall not present it to His Majesty until the Legislative Committee signify its desire that it should be so presented.

(5) At any time before the presentation of the report to His Majesty the Legislative

Committee may, either on its own motion or by direction of the Church Assembly, withdraw a measure from further consideration by the Ecclesiastical Committee; but the Legislative.

Committee shall have no power to vary a measure of the Church Assembly either before or after conference with the Ecclesiastical Committee.

(6) A measure passed in accordance with this Act may relate to any matter concerning the Church of England, and may extend to the amendment or repeal in whole or in part

of any Act of Parliament, including this Act.

4. When the Ecclesiastical Committee shall have reported to His Majesty on any measure submitted by the Legislative Committee, the report, together with the text of such measure, shall be laid before both Houses of Parliament forthwith, if Parliament be sitting; if not, then immediately after the next meeting of Parliament, and thereupon, on an Address from each House of Parliament asking that such measure should be presented to His Majesty, such Measure shall be presented to His Majesty, and shall have the force and effect of an Act of Parliament on the Royal Assent being signified thereto in the same manner as to Acts of Parliament.

5. This Act may be cited as the Church of England Assembly (Powers) Act, 1919.

Brought from the Lords 22 July 1919.

Ordered by The House of Commons, *to be Printed*, 23 July 1919.

APPENDIX 4

House of Lords Reform Draft Bill **- MAY 2011**

Church of England Bishops

91. Currently, the Lords Spiritual – the 2 Archbishops and 24 Bishops of the Church of England – have reserved places in the House of Lords. They do not sit for life, but only for their period as an Archbishop or Bishop of a diocese. Although historically they sit as independent members of the Lords they are widely regarded as representatives of the Church of England.

92. The Government proposes that in a fully reformed second chamber, which had an appointed element, there should continue to be a role for the established Church. However, in line with proposals for a reduction in the size of the second chamber, the Government proposes that the number of reserved places for Church of England Archbishops and Bishops should also be reduced, from 26 to a maximum of 12.

93. The Government proposes that transitional arrangements should also apply to the Bishops to allow a gradual reduction to take place. The Government believes that this arrangement would allow the Bishops to continue to contribute effectively to the reformed House of Lords.

94. The Archbishops of Canterbury and York and the Bishops of London, Durham and Winchester hold a seat in the House of Lords as of right under the Bishoprics Act 1878. The Government proposes that they should be entitled to occupy reserved places in the reformed second chamber throughout the transitional period and in the fully reformed chamber for as long as they hold that named office. If one of these Archbishops or Bishops were to leave that office, then he would be replaced in the reformed House of Lords by the new holder of that office.

95. The other 7 places would be reserved for Bishops of dioceses in England. These Bishops would be selected to sit in the reformed House of Lords by the Church of England.

First transitional period

96. Presently, in addition to the holders of the five named offices, there are 21 Church of England Bishops entitled to sit in the House of Lords, in order of seniority. It would be for the Church to select up to 16 of these 21 Bishops to remain in the House of Lords during the first transitional period. These members would have to be selected from those in the House of Lords who immediately before the dissolution of Parliament before the first election, would be entitled to sit as Bishops in the House of Lords.

Second transitional period

97. At the time of the second election to the reformed House of Lords, it would be for the Church to select a maximum of 11 of the Bishops to remain throughout the second (and final) transitional period. They would be selected only if they had been in the reformed House of Lords immediately before the dissolution of the Parliament of the first transitional period.

98. At the time of the third election to the reformed House of Lords, it would be for the Church of England to select up to 7 of these Bishops to sit in the chamber.

Fully reformed chamber

99. For each subsequent electoral period, a maximum of 7 serving Church of England Bishops could be selected by the Church to sit in the reformed House of Lords. They would be able to be selected from those Bishops who were sitting in the reformed House of Lords at that time or serving Church of England Bishops not in the chamber, but they would not be the holder of a named office.

100. The Church would not be obliged to fill any of the places reserved for Bishops at the start of each transitional or electoral period. If however it chose to fill any of these seats, and a vacancy subsequently arose among them, the Church would be able to fill the vacancy only if not to do so would cause the number of Bishops (excluding holders of a named office) to fall below 7. The Church would be able to select any serving Bishop, except a named office holder, to fill the vacancy.

101. A vacancy would arise if a Bishop becomes one of the named office holders or ceases to be a Bishop, or resigns from the reformed House of Lords. If, at any time, one of the Bishops in the reformed House of Lords became the Bishop of a different diocese, he would continue to hold a reserved place

102. The Bishops who would remain in the reformed House of Lords after the end of the transitional period would have the same speaking and voting rights as other members of the reformed House of Lords.

103. The Bishops would continue to sit in the reformed House of Lords on a different basis from other members. Currently, Bishops sit in the House of Lords by virtue of their being serving office holders within the Church of England. They attend on a rota basis as their Episcopal duties allow. They are also subject to the Church's terms and conditions on remuneration and discipline.

Therefore in the transitional period, and in a fully reformed chamber, the Government proposes that:

• Bishops would not be entitled to a salary or pension in the reformed House of Lords;

• Bishops would be exempt from the tax deeming provision;

• Bishops would be entitled to claim allowances under the scheme administered by the IPSA for members of the reformed House of Lords;

• They would be subject to the disqualification provision;

• They would not be subject to the serious offence provision and those on expulsion and suspension as it is anticipated that such members would be subject to the disciplinary procedures established by the Church of England.

APPENDIX 5

CHURCH OF ENGLAND: CHURCH CARE

THE ROLE OF A CHURCHWARDEN

The role of a churchwarden is extremely varied but is best described as management, maintenance, and ministry. Management refers to the churchwarden's relationship with the clergy, the PCC and the members of the congregation; maintenance refers to his or her responsibilities to look after the church building; and ministry refers to their pastoral role with regard to the parish priest and to the congregation.

It is a shared leadership, but it is leadership rather than management. The churchwarden should be someone who the congregation respects as a leader and who can take charge when needed. A churchwarden may have to take a service at ten minutes notice, or deal with the press when some scandal occurs. He or she needs to guide the PCC to make the right decisions. Churchwardens should be wise and, if needed, firm. They should not be frightened when dealing with senior clergy. They should maintain their own Christian faith, and not let it become stale.

Many of the churchwarden's responsibilities are connected with maintenance. But there are also responsibilities in connection with the Sunday services, for keeping order in the church, and for collecting the church offerings. Churchwardens have to make various reports each year to the annual parochial meeting and to the archdeacon. They may be

trustees of some charitable trust connected with the church. They have to go to all the meetings of the PCC and the standing committees, and should meet and pray regularly with the parish priest. Their work is not just the maintenance of the church building, but helping the smooth running of the church.

Their third and most important role is on a personal level. A churchwarden cares for the parish priest and the parish priest's family. A churchwarden should also care for the congregation, to encourage its members in their Christian faith, and to help heal any quarrels or disagreements that arise between them or between the congregation and the parish priest.

HTTP://WWW.CHURCHCARE.CO.UK/FURTHER.PHP?BADA [ACCESSED ON 1ST SEPTEMBER 2011**]**

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